

YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
  
1978

*Volume II*  
*Part One*

*Documents of the thirtieth session*  
*(excluding the report of the Commission*  
*to the General Assembly)*

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UNITED NATIONS





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## NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The word *Yearbook* followed by ellipsis points and the year (e.g., *Yearbook ... 1975*) indicates a reference to the *Yearbook of the International Law Commission*.

Part One of volume II contains the reports of the Special Rapporteurs discussed at the session, and certain other documents. Part Two of the volume contains the Commission's report to the General Assembly.

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# MOST-FAVOURED-NATION CLAUSE

[Agenda item 6]

DOCUMENT A/CN.4/309 and ADD.1 and 2\*

Report on the most-favoured-nation clause by Mr. Nikolai Ushakov, Special Rapporteur

[Original: Russian]

[11 and 12 April and 10 May 1978]

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\* The initial report of the Special Rapporteur (A/CN.4/309) was established in the light of the comments received by him from Member States, United Nations organs, specialized agencies and other intergovernmental organizations as at 15 February 1978. Comments received after that date, as well as the relevant comments of the Special Rapporteur, which were originally incorporated in documents A/CN.4/309/Add.1 and 2, have been inserted in the appropriate headings of the present document.

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#### ABBREVIATIONS

CCC	Customs Co-operation Council
ECE	Economic Commission for Europe
ECWA	Economic Commission for Western Asia
EEC	European Economic Community
EFTA	European Free Trade Association
GATT	General Agreement on Tariffs and Trade
GSP	Generalized system of preferences
IAEA	International Atomic Energy Agency
IBEC	International Bank for Economic Co-operation
ICAC	International Cotton Advisory Committee
ILO	International Labour Organisation
IMCO	Inter-Governmental Maritime Consultative Organization
IMF	International Monetary Fund
LAFTA	Latin-American Free Trade Association
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDO	United Nations Industrial Development Organization
WFC	World Food Council
WHO	World Health Organization
WMO	World Meteorological Organization
WTO	World Tourism Organization

## I. Introduction

### A. BASIS OF THE REPORT

1. In its resolution 31/97 of 15 December 1976, the General Assembly welcomed the fact that the International Law Commission had completed the first reading of the draft articles on the most-favoured-nation clause and recommended that the Commission should complete at its thirtieth session, in the light of comments received from Member States, from organs of the United Nations which have competence on the subject-matter and from interested inter-governmental organizations, the second reading of the draft articles on the most-favoured-nation clause adopted at its twenty-eighth session.

2. In its resolution 32/151 of 19 December 1977, the General Assembly approved the programme of work planned by the International Law Commission

for 1978, which provided, among other things, that at the Commission's thirtieth session priority should be given to consideration of the question under discussion, and again recommended that the Commission should complete at its thirtieth session the second reading of the draft articles on the most-favoured-nation clause adopted at its twenty-eighth session, as recommended by the General Assembly in resolution 31/97.

3. Accordingly, the current report must be based on the draft articles on the most-favoured-nation clause contained in the report of the Commission on the work of its twenty-eighth session.<sup>1</sup> In accordance with the resolutions of the General Assembly, these draft articles must be considered in the light of the written comments of Member States and the oral comments

<sup>1</sup> See *Yearbook ... 1976*, vol. II (Part Two), pp. 11 *et seq.*, document A/31/10, chap. II, sect. C.

made by them in the course of the discussion of the draft articles in the Sixth Committee and the General Assembly, and in the light of the comments made by the appropriate United Nations organs and inter-governmental organizations, with a view to making the changes and improvements in the draft considered necessary by the Commission.

4. Accordingly the duty of the Special Rapporteur, as he sees it, is to help the Commission to accomplish its task on the basis of the draft articles adopted in first reading. At this stage, any substantial revision of the concepts on which the draft articles are based would hardly be useful or advisable, particularly since, in the opinion of the Special Rapporteur, the draft as a whole was warmly received by the General Assembly and its basic premises were approved.

5. The Special Rapporteur is extremely pleased to note this generally positive response to the Commission's draft articles; in his opinion, this response is mostly the result of the extensive knowledge and outstanding competence in the field in question of Mr. Endre Ustor, the Commission's Special Rapporteur. Mr. Ustor's extremely scholarly and interesting reports, on which the Commission's work is based, are as valuable as ever at the current stage of the Commission's work. The Commission has already realized the value of the work done by Mr. Ustor, but will obviously do so again during the second reading of the draft articles under discussion.

6. In the view of the Special Rapporteur, there is no need here to go over the Commission's work on the draft articles on the most-favoured-nation clause. The progress made is summarized in the report of the Commission on its twenty-eighth session,<sup>2</sup> which gives references to all related documentation. A reference to chapter II of this report is unavoidable, since the draft articles and commentaries contained in it are to provide the basis for the completion of the Commission's work and the second reading at its thirtieth session.

7. The question of the draft articles on the most-favoured-nation clause was discussed by the Sixth Committee at the thirty-first session of the General Assembly during the consideration of the Commission's report on its twenty-eighth session. The oral comments of Member States on the draft are summarized in the report of the Sixth Committee.<sup>3</sup>

8. Some general oral comments on the draft articles were made by Member States in the Sixth Committee at the thirty-second session of the General Assembly during the consideration of the question of the programme of work for the Commission's thirtieth session. These comments are summarized in the report of the Sixth Committee.<sup>4</sup>

9. As at 10 May 1978, written comments on the draft articles had been received from the following Member States: the Byelorussian Soviet Socialist Republic, Colombia, Czechoslovakia, the German Democratic Republic, Guyana, Hungary, Luxembourg, Sweden, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics and the United States of America.<sup>5</sup>

10. As of the same date, written comments had been received from the following organs of the United Nations, specialized agencies and other international organizations: ECE,<sup>6</sup> ECWA, UNESCO, IAEA, WTO, GATT, the Caribbean Community Secretariat, the Board of the Cartagena Agreement, EEC, EFTA, LAFTA, as well as CCC and the Central Office for International Railway Transport.<sup>7</sup>

11. A number of organs and international organizations stated that they had no comments on the draft. Such statements were received from UNIDO, WFC, ILO, WHO, IMF, WMO, IMCO, IBEC and ICAC.

12. The Commission's secretariat also kindly sent the Special Rapporteur the Secretary-General's notes transmitting the report of the Conference on International Economic Co-operation<sup>8</sup> and the addendum to that note,<sup>9</sup> as well as the Secretary-General's report entitled "Economic co-operation among developing countries".<sup>10</sup> Section II, paragraph 1, of the report of the Conference on International Economic Co-operation and subsections A and B of the Secretary-General's report contain useful information on the most-favoured-nation clause.

## B. STRUCTURE OF THE REPORT

13. This report is divided into four sections, as follows:

*Section I:* Introduction

*Section II:* Comments on the draft articles as a whole

*Section III:* Comments on individual provisions of the draft articles

*Section IV:* The problem of the procedure for the settlement of disputes relating to the interpretation and application of a convention based on the draft articles.

<sup>5</sup> See *Yearbook ... 1978*, vol. II (Part Two), p. 162, document A/33/10, annex, sect. A. (Note: In the mimeographed version of the present document, the references to written comments referred to documents A/CN.4/308 and Add. 1-2. As the latter have been reproduced as an annex to the Commission's report, contained in volume II (Part Two) of the *Yearbook*, it is felt that it is more convenient to refer the reader directly to that publication.)

<sup>6</sup> *Ibid.*, sect. B.

<sup>7</sup> *Ibid.*, sect. C.

<sup>8</sup> A/31/478 and Corr. 1.

<sup>9</sup> A/31/478/Add. 1 and Add. 1/Corr. 1.

<sup>10</sup> A/32/312.

<sup>2</sup> *Ibid.*, pp. 4 et seq., document A/31/10, paras. 10-36.

<sup>3</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, paras. 14-85.

<sup>4</sup> *Ibid.*, *Thirty-second Session, Annexes*, agenda item 112, document A/32/433, paras. 188-191.

14. Sections II, III and IV will deal with both the oral comments of Member States on the draft articles, comments which, as indicated above,<sup>11</sup> are summarized in the reports of the Sixth Committee to the General Assembly at its thirty-first and thirty-second sessions, and the written comments of Member States, organs of the United Nations and international organizations.<sup>12</sup>

15. The Special Rapporteur will also give his own comments on editorial questions which, in his opinion, should be considered during the second reading of the draft articles.

## II. Comments on the draft articles as a whole

16. In the opinion of the Special Rapporteur, the debates on the Commission's report at the thirty-first and thirty-second sessions of the General Assembly show that, on the whole, the draft articles on the most-favoured-nation clause adopted by the Commission at its twenty-eighth session were generally approved by Member States as a basis for the completion of work on the draft in second reading. The report of the Sixth Committee to the General Assembly at its thirty-first session indicates that those representatives who spoke on chapter II of the Commission's report expressed their general satisfaction with regard to the fact that the Commission had completed the first reading of the draft articles on this question.<sup>13</sup> There was general agreement that the draft articles should be passed on to Governments and competent United Nations bodies for their comments.<sup>14</sup> At the thirty-second session, representatives widely supported the Commission's intention to complete the second reading of the draft articles at its 1978 session;<sup>15</sup> it was said that the draft was well conceived and that it was to be hoped that it could take the form of an international instrument.<sup>16</sup> Note was taken of the outstanding services of Professor Endre Ustor.

17. However, many representatives, in commenting on the draft articles adopted by the Commission in first reading, referred either to the draft articles as a whole or to specific provisions. One of the tasks of the Special Rapporteur in this report is to organize and examine these comments. Some oral comments also dealt with related issues not touched upon in the draft articles.

<sup>11</sup> See paras. 7-8.

<sup>12</sup> See paras. 9-10.

<sup>13</sup> See *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 14.

<sup>14</sup> *Ibid.*, para. 19.

<sup>15</sup> *Ibid.*, *Thirty-second Session, Annexes*, agenda item 112, document A/32/433, para. 188.

<sup>16</sup> *Ibid.*, para. 189.

### A. THE IMPORTANCE OF THE PROBLEM AND OF THE WORK OF CODIFICATION

#### *Comments of States*

##### *Oral comments*

18. According to the 1976 report of the Sixth Committee, some delegations stated that the application of most-favoured-nation treatment was of the greatest importance for co-operation among States in the sphere of economic relations in general and in the development of international trade in particular. This was shown by numerous international documents such as the Final Act of the Conference on Security and Co-operation in Europe<sup>17</sup> and the Charter of Economic Rights and Duties of States.<sup>18</sup> The view was expressed that the most-favoured-nation clause was an important instrument for the promotion of equitable and mutually advantageous economic relations among all States, regardless of existing differences in social systems and levels of development.<sup>19</sup>

19. In the opinion of some representatives, there could be no doubt of the timeliness of the Commission's work on the topic. Several representatives considered the set of 27 draft articles to be generally acceptable and a good basis for further work. The opinion was expressed that the set of articles on the most-favoured-nation clause met in general the requirements in respect of such articles, for it included all the questions the codification of which might be useful for the practical application of the clause.

##### *Written comments*<sup>20</sup>

20. *Byelorussian Soviet Socialist Republic.* In the opinion of the Byelorussian SSR, the most-favoured-nation principle is extremely important for ensuring co-operation among States in their economic relations in general and in the development of international trade in particular. The Byelorussian SSR favours the general recognition and universal application of the most-favoured-nation principle in international economic relations. In its view, the draft articles on the most-favoured nation clause prepared by the Commission provide a fully satisfactory basis for drafting an international convention on the matter.

21. *German Democratic Republic.* In the opinion of the German Democratic Republic, most-favoured-nation treatment, which over the centuries has become an important element of international commercial relations, promotes co-operation based on

<sup>17</sup> *Final Act of the Conference on Security and Co-operation in Europe*, Helsinki, 1975 (Lausanne, Imprimeries Réunies), p. 75.

<sup>18</sup> General Assembly resolution 3281 (XXIX).

<sup>19</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 15.

<sup>20</sup> See *Yearbook ... 1978*, vol. II (Part Two), p. 162, document A/33/10, annex, sect. A.

equality and mutual advantage among all States. Its application is thus in the interests of world peace and international security. The draft articles drawn up by the Commission are therefore of fundamental importance. The Commission has succeeded in elaborating a well-considered draft which embodies the experience of many years in concluding most-favoured-nation clauses and takes due account of the most recent developments in this field.

22. *Luxembourg.* The Government of Luxembourg paid tribute to the work accomplished by the Commission, which is characterized by the exceptionally abundant body of material on treaties, judicial practice and doctrine on the subject collected as a basis for a study in depth. Whatever the ultimate fate of the draft articles, this research in itself constitutes a useful and lasting contribution to the development of international law.

23. *Union of Soviet Socialist Republics.* In the opinion of the USSR, the mutual granting by States of most-favoured-nation treatment is one way of implementing the generally recognized international legal principle of the sovereign equality of States by which the Soviet Union is unfailingly guided in its foreign policy and which, among other things, is laid down in the new 1977 Constitution of the USSR. The application of the principle of most-favoured-nation treatment creates maximum opportunity for developing peaceful economic co-operation among States.

24. The ever-increasing application in international economic relations of most-favoured-nation treatment is an important objective that greatly promotes the development of co-operation in trade and economic matters among States with different social systems. The measures being taken to achieve this objective are deserving of support. This is also true of the Commission's work on the codification of general principles of international law determine the legal nature, conditions and consequences of applying treaty provisions on most-favoured-nation treatment.

25. *Sweden.* In the opinion of the Swedish Government, the draft articles are to be commended. The draft articles as well as the commentary are of a high quality and reflect the seriousness and thoroughness with which the Commission has performed its important work of codification. Except for a few points, the draft articles seem to be acceptable to the Swedish Government.

26. *Hungary.* The Hungarian Government attaches great importance to the work of codification within the framework of the United Nations. The importance and topicality of this draft are underlined by the fact that an ever broader unconditional application of the most-favoured-nation principle, free from discrimination and based on mutual advantages, is bound to play a most significant role in the economic and commercial relations of States.

27. *United States of America.* The United States Government generally and warmly supports the Commission's draft articles and favours their adoption.

28. *Ukrainian Soviet Socialist Republic.* The Ukrainian SSR believes that, in present-day conditions, the codification of principles and norms conducive to the development of mutually beneficial economic co-operation among States on a footing of equality is very timely and has great practical significance. The draft articles on the most-favoured-nation clause prepared by the Commission have a very important role to play in this connexion.

29. *Czechoslovakia.* The draft articles on the most-favoured-nation clause established by the Commission form a good basis for international regulation of that institution. In principle, the proposed articles correspond to the needs of international economic relations.

30. *Colombia.* The Republic of Colombia is in agreement with the draft as a whole.

#### *Comments of international organizations*

31. *General Agreement on Tariffs and Trade.*<sup>21</sup> In the opinion of the GATT secretariat, the draft articles prepared by the Commission would contribute substantially to the understanding of the most-favoured-nation clause and would help reduce uncertainty and conflicts in its application. A wealth of jurisprudence, practice and doctrine on the most-favoured-nation clause has been condensed into a few clear rules.

32. *Board of the Cartagena Agreement.*<sup>22</sup> The Board believes that the draft articles prepared by the Commission have great merit.

### B. THE MOST-FAVoured-NATION CLAUSE AND THE PRINCIPLE OF NON-DISCRIMINATION

#### *Comments of States*

##### *Oral comments*

33. The 1976 report of the Sixth Committee shows that some representatives quoted with approval from passages contained in paragraphs 37 to 40 of the Commission's report on its twenty-eighth session concerning the relationship between the clause and the principle of non-discrimination.<sup>23</sup>

#### OPINION OF THE SPECIAL RAPPORTEUR

34. In the opinion of the Special Rapporteur, the passages prepared by the Commission on this question are of vital importance to an understanding of the draft articles on the most favoured-nation-clause and it should restore them and possibly develop

<sup>21</sup> *Ibid.*, p. 178, document A/33/10, annex, sect. C, subsect. 3.

<sup>22</sup> *Ibid.*, p. 179, subsect. 4.

<sup>23</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes, agenda item 106, document A/31/370, para. 20.*

them further in its report on the results of the second reading of the draft articles.

C. THE MOST-FAVOURLED-NATION CLAUSE AND THE DIFFERENT LEVELS OF ECONOMIC DEVELOPMENT OF STATES

*Comments of States*

*Oral comments*

35. According to the 1976 report of the Sixth Committee,<sup>24</sup> some Member States considered that the draft articles rested on a firm foundation, for the Commission, in formulating the articles, had proceeded from the generally recognized principles and rules of international law and from an evaluation of State practice, judicial decisions and legal writings. The articles took into account the fundamental changes that had taken place in international economic relations, and especially in international trade, during recent years, and also the need to abolish unjustified trade barriers and promote international co-operation on the basis of mutual respect and equity. In particular, they took into consideration United Nations resolutions on the new international economic order. At a time when efforts were being made to institute a new international economic order, due account must be taken of the negative impact of the clause on economically disadvantaged partners and some restrictions regarding its application should be established. In this connexion, satisfaction was expressed by some members of the Sixth Committee at the elaboration by the Commission of new rules relating to exceptions to commitments in the most-favoured-nation clause.

36. Certain representatives, nevertheless, wondered whether the Commission had given sufficient study to the relationship between the application of the clause and the position of the developing countries. That aspect of the draft should be given further study at the second reading, taking into account the specific measures that could be adopted in order to institute a new international economic order.

37. In the view of a number of representatives, the draft articles did not effectively reflect the spirit of new economic principles generated by recent international events and approved by various legislative forums. Some of the articles did not adequately take account of the declarations and resolutions which had been adopted to preserve the interests of the developing countries, in particular the Declaration on the Establishment of a New International Economic Order,<sup>25</sup> the Charter of Economic Rights and Duties of States,<sup>26</sup> the resolutions of the General Assembly

concerning the permanent sovereignty of all peoples in relation to their natural wealth and resources,<sup>27</sup> and various resolutions of UNCTAD.

38. Although the Commission referred to developments in UNCTAD and elsewhere, its draft articles did not reflect the progressive development of rules in international trade which might be beneficial to developing countries.

39. The Commission should review those provisions of its draft which did not take due account of different levels of economic development and should promote the development of contemporary trade relations in conformity with the decisions of UNCTAD and other forums. It should take into account the pivotal role of regional economic integration movements in the development of the agricultural and industrial sectors of developing countries participating in such movements, the right of developing countries to accord advantages to one another, without according them to developed third States, and their right to receive non-reciprocal and non-discriminatory preferential treatment for their products from the developed countries.

OPINION OF THE SPECIAL RAPPORTEUR

40. The Special Rapporteur is of the opinion that, in working on the draft articles in first reading, the Commission as a whole and each of its members were concerned with the need to take due account of the interests of developing countries within the framework of the draft. He is convinced that the Commission will continue to be guided by this concern during the second reading of the draft articles.

41. However, in the draft articles under discussion, the Commission does not deal with the problem of the rules of international law governing economic relations between States in the broad sense; those are the "primary" rules to which, in particular, specific clauses in treaties between States relate. The draft articles on the most-favoured-nation clause contain "secondary" rules, concerning a number of general legal conditions for the application of specific clauses.

42. Thus, the question of taking due account of the interests of developing countries in the draft articles under discussion comes down to the question of allowing exceptions to commitments in the clause in order to favour developing countries, a topic dealt with in articles 21 and 27.

43. The specific suggestions of Member States and international organizations on this question will be considered by the Special Rapporteur in the context of the articles referred to.

<sup>24</sup> *Ibid.*, paras. 21-26.

<sup>25</sup> General Assembly resolution 3201 (S-VI).

<sup>26</sup> General Assembly resolution 3281 (XXIX).

<sup>27</sup> See, for instance, resolutions 626 (VII), 1803 (XVII), 2158 (XXI), 2386 (XXIII), and 2692 (XXV).



## D. THE GENERAL CHARACTER OF THE DRAFT ARTICLES

*Comments of States**Oral comments*

44. According to the 1976 report of the Sixth Committee, several representatives of Member States noted with satisfaction that the Commission had followed the Vienna Convention on the Law of Treaties<sup>28</sup> closely in drafting the articles and that it considered that the draft articles should be interpreted in the light of that Convention. They agreed with the Commission that the draft articles should be an autonomous set and not an annex to the Vienna Convention.<sup>29</sup>

## (a) Scope of the draft

*Oral comments*

45. According to the 1976 report of the Sixth Committee, the opinion was expressed that the Commission had appropriately focused on the legal character of the clause and the effects of the clause as a legal institution in the context of all aspects of its practical application. The Commission had studied the legal consequences of the application of the most-favoured-nation clause, as well as the rules of interpretation to be adopted and, more generally, the legal problems involved in the application of the clause. That approach had enabled the Commission to submit draft articles in which the clause was considered in a general manner and not in relation to the specific field in which it was applied.<sup>30</sup>

## (b) Form of the draft

*Oral comments*

46. In the Sixth Committee, in 1976, the representatives of some Member States, referring to the question of the final form of the codification of the topic, said that they found the draft articles generally acceptable as a basis for the elaboration at a future date of a convention which would be an effective instrument for promoting international trade on a non-discriminatory basis. Other representatives, however, reserved their position on this matter.<sup>31</sup>

<sup>28</sup> For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289. The Convention is hereafter referred to as the "Vienna Convention".

<sup>29</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 27.

<sup>30</sup> *Ibid.*, para. 28.

<sup>31</sup> *Ibid.*, para. 33.

*Written comments*<sup>32</sup>

47. *Byelorussian SSR*. In the view of the Byelorussian SSR, the draft articles on the most-favoured-nation clause provide a fully satisfactory basis for drafting an international convention on the matter.

48. *German Democratic Republic*. In view of the fact that the German Democratic Republic drafted a special paragraph for inclusion "in the preamble to the convention on the most-favoured-nation clause", the Special Rapporteur is inclined to conclude that that State is in favour of turning the draft articles into a convention at some future date.

49. *USSR*. In the opinion of the USSR, the draft articles on the most-favoured-nation clause prepared by the Commission are an entirely satisfactory basis for the drafting of an international convention on the subject.

50. *Luxembourg*. The Government of Luxembourg believes it would be inappropriate to continue work on these draft articles with the intention of preparing the text of a treaty. The most that could be expected to result would be a collection of aids to interpretation in the form of very flexible recommendations.

51. *Hungary*. The Hungarian Government feels that the draft text on the most-favoured-nation clause provides in general an appropriate basis, as regards both its concept and its provisions, for the elaboration of an international treaty.

52. *Ukrainian SSR*. The Ukrainian SSR considers that the draft articles on the most-favoured-nation clause can serve as an entirely satisfactory basis for the preparation of an international convention.

63. *Czechoslovakia*. Czechoslovakia considers that a convention would represent a most suitable form of codification.

## OPINION OF THE SPECIAL RAPPORTEUR

54. According to established practice, the Commission's decision on the final form of the codification of the topic should be taken after the completion of the draft articles in second reading.

55. The Special Rapporteur therefore considers that it would be premature for him to suggest that the Commission should decide one way or another on this question at this stage.

### III. Comments on individual provisions of the draft articles

## INTRODUCTORY COMMENTS OF THE SPECIAL RAPPORTEUR

56. As was the case in the preceding section, the comments on each article made by Member States in

<sup>32</sup> See foot-note 20 above.

the Sixth Committee and summarized in the 1976 and 1977 reports of the Sixth Committee will be given below under the heading "Oral comments". The written comments of Member States will be given under the heading "Written comments". The written comments of United Nations bodies, specialized agencies and other intergovernmental organizations will be given under the heading "Comments of international organizations". The absence of any of these headings indicates that no oral or written comments were made on the article in question.

57. The Special Rapporteur intends to give the comments of States and international organizations in the order which, in his opinion, will best serve to clarify the substance of the comments. In some cases, therefore, the alphabetical order of the names of States and organizations will not be observed.

58. According to established practice, the Commission gives its definition of the terms used after it has considered all the draft articles. Accordingly, the views of the Special Rapporteur on the provisions of article 2 are preliminary in nature.

59. The question of the order of the draft articles is also normally considered by the Commission on the completion of all the draft articles. Accordingly, the Special Rapporteur does not deal with that question in this report.

### *Article 1. Scope of the present articles*

#### *Comments of States*

##### *Oral comments*

60. It was suggested that the words "in written form" should be added after the word "treaties" in the text of article 1.<sup>33</sup>

##### *Written comments*<sup>34</sup>

61. *Luxembourg.* According to this article, the scope of the articles would be restricted to most-favoured-nation clauses contained "in treaties between States". This provision restricts the scope of the draft articles since, following the establishment of regional economic groupings in various parts of the world, the clause might be found more and more frequently in agreements concluded by unions or groups of States. This development should be taken into account and the scope of the articles should be defined accordingly.

62. *Czechoslovakia.* Czechoslovakia notes that in article 1, and possibly article 2, the application of the draft convention is limited only to the most-favoured-nation clauses contained in written agree-

ments concluded between States. This will substantially limit its application in practice. The most-favoured-nation clause is primarily applied in the commercial and political fields, in which some States have transferred the right to conclude international agreements to the international organizations of which they are members. This applies primarily to EEC. As they now stand, the draft articles would not apply to the most-favoured-nation clauses contained in EEC treaties and agreements with other States. It would therefore be expedient to change the main subject of the draft articles in such a way that they would apply also to the most-favoured-nation clause contained in international treaties whose parties include those international organizations which conclude treaties with the most-favoured-nation clause on behalf of their member States, such treaties being effective in the territory of those States.

#### OPINION OF THE SPECIAL RAPPORTEUR

63. The Special Rapporteur considers it unnecessary to stipulate in article 1 that the articles apply to treaties in written form. The meaning of the word "treaty" as used in this article and in the draft articles as a whole is defined in article 2 (a) which provides, in particular, that "treaty" means an agreement in written form.

64. Article 1 and the draft articles as a whole concern most-favoured-nation clauses, by which is meant, according to article 4, treaty provisions whereby a State undertakes to accord most-favoured-nation treatment to another State. Such undertakings between States may be found, and in fact are found, in treaties between States, both bilateral and multilateral. With respect to the "unions of States" or "groups of States" referred to in the comments of the Government of Luxembourg, it may be asked whether there are any such "unions of States" or "groups of States" that could enter into international treaties and bind their member States to those treaties. The Special Rapporteur knows of no such unions or groups of States.

65. The Special Rapporteur believes that, in fact, the comments of Luxembourg concern unions, which, in the absence of any other established term, the Special Rapporteur is inclined to refer to as an international organization of a supranational character. Among other things, such "supranational organizations" claim, within the limits of some established competence, to represent their member States and to bind them to treaties with non-member States.

66. "Supranational organizations" are, to say the very least, an extremely new phenomenon in the modern world. The Special Rapporteur knows of only one example of such an organization. He also doubts whether, in contemporary international law, there are any firmly established generally recognized rules applicable to "supranational organizations".

<sup>33</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes, agenda item 106, document A/31/370, para. 34.*

<sup>34</sup> See foot-note 20 above.

67. The Special Rapporteur therefore considers that it would be advisable to retain the present text of article 1.

*Comments of international organizations*

68. EEC.<sup>35</sup> The Community feels that, in their over-all conception, the draft articles prepared by the Commission are directed exclusively at States and appear to ignore integrated groups of States or groups in the process of integration. The existence and functioning of the Community are only one example among many of the growing tendency throughout the world to establish regionally integrated areas. Account should be taken of the fact that this causes the application of the clause to be transferred from the State to the regional level.

69. In the opinion of EEC, the Community is a customs union, but it is also much more than that. One of its aims is to promote "closer relations between its Member States" (Art. 2 of the Treaty establishing the European Economic Community).<sup>36</sup> Article 3 of the Treaty therefore provides not only for the elimination of customs duties and quantitative restrictions, the establishment of a common customs tariff, the abolition between Member States of the obstacles to the free movement of persons, services and capital, and the approximation of their respective municipal law, but also the establishment of a whole series of common policies, including common policies in the fields of agriculture and transport and common institutions to promote advanced economic integration.

70. Member States have transferred to the Community their individual powers to determine trade policy. As a result, questions relating to the application of the most-favoured-nation clause in trade matters now fall exclusively within the competence of the Community, so that it is the Community and not its member States which accords and receives most-favoured-nation treatment vis-à-vis all the contracting parties of GATT and others. To that extent, the Community exercises powers in this specific area which are normally wielded by States.

71. In the light of its observations concerning the trend towards the establishment of regionally integrated areas and of the fact that the Community has exclusive powers in the field of trade comparable to those exercised by States, EEC suggests that draft article 2 should be supplemented by the following definition:

*"The expression 'State' shall also include any entity exercising powers in spheres which fall within the field of application of these articles by virtue of a transfer of power made in favour of that entity by the sovereign States of which it is composed."*

<sup>35</sup> See *Yearbook ... 1978*, vol. II (Part Two), p. 179, document A/33/10, annex, sect. C, subsect. 6.

<sup>36</sup> For the text of the Treaty establishing the European Economic Community (Treaty of Rome), see United Nations, *Treaty Series*, vol. 298, p. 11.

OPINION OF THE SPECIAL RAPPORTEUR

72. The Special Rapporteur feels that, even though the proposal of EEC is intended to supplement article 2 (Use of terms), the Community's comment and proposal nevertheless relate in fact to the substance of article 1. Under article 1, treaties concluded by EEC which contain a clause (within the Community's sphere of competence) actually do not fall within the purview of the draft articles, even where the clause itself conforms to what is now said about it in article 4.

73. However, the Community, in so far as relates to its recently acquired power to take action in a specific sphere that is binding on its member States, represents a very new and, at present, obviously unique phenomenon. The Special Rapporteur has described this phenomenon, which clearly cannot be equated with either a State or an international organization, as a "supranational organization".<sup>37</sup>

74. The Special Rapporteur believes that, where problems of any kind relating to international law arise with reference to "supranational organizations", they are broader problems than those relating to most-favoured-nation clauses. One problem that may arise is the question of what rules in the sphere of treaty law are applicable to "supranational organizations", including EEC. The proposal to treat EEC in the same manner as a State would, for example, hardly provide a solution to the problem of the applicability of the Vienna Convention to treaties to which EEC is a party.

75. The Special Rapporteur therefore feels that it is not advisable to attempt to solve, within the framework of these draft articles, the problems of groups having supranational competence.

*Article 2. Use of terms*

*Comments of States*

PARAGRAPH (a)

*Oral comments*

76. According to the 1976 report of the Sixth Committee in 1976, some representatives suggested the elimination of article 2, paragraph (a), since the definition of the term "treaty", as laid down in the Vienna Convention, was a broad definition the purpose of which was to restrict the meaning to treaties in written form between States.<sup>38</sup>

*Written comments*<sup>39</sup>

77. *Luxembourg.* In the opinion of Luxembourg, paragraph (a) reproduces the corresponding provision of the Vienna Convention.

<sup>37</sup> See paras. 65-66 above.

<sup>38</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 35.

<sup>39</sup> See foot-note 20 above.

## OPINION OF THE SPECIAL RAPPORTEUR

78. It is true that article 2, paragraph (a), contains exactly the same wording as article 2, paragraph 1 (a) of the Vienna Convention. However, in both the Vienna Convention and these draft articles, the terms are defined solely for the purposes of the instrument concerned. The Special Rapporteur therefore suggests that paragraph (a) should be retained in its present form.

## PARAGRAPH (b)

*Written comments*<sup>40</sup>

79. *Luxembourg* considers paragraph (b) to be necessary and useful in the régime established by the draft articles.

## OPINION OF THE SPECIAL RAPPORTEUR

80. The Special Rapporteur suggests that paragraph (b) should be retained in its present form.

## PARAGRAPH (c)

*Written comments*<sup>41</sup>

81. *Luxembourg* considers paragraph (c) to be necessary and useful in the régime established by the draft articles.

## OPINION OF THE SPECIAL RAPPORTEUR

82. The Special Rapporteur suggests that paragraph (c) should be retained in its present form.

## PARAGRAPH (d)

*Written comments*<sup>42</sup>

83. *Luxembourg* considers paragraph (d) to be necessary and useful in the régime established by the draft articles.

## OPINION OF THE SPECIAL RAPPORTEUR

84. The Special Rapporteur suggests that paragraph (d) should be retained in its present form.

## PARAGRAPH (e)

*Oral comments*

85. According to the 1976 report of the Sixth Committee, some representatives approved draft para-

graph (e), since a definition of the term "material reciprocity" was essential to a proper understanding and interpretation of the articles, making it possible, in particular, to distinguish between the terms "material reciprocity" and "formal reciprocity".

86. Other representatives considered that the meaning of the terms "material reciprocity" and "equivalent treatment" was not completely clear, even though the commentary to articles 8 to 10 shed some light on the point. It was said that neither paragraph (e) nor articles 9, 10, 18, paragraph 2, and 19, paragraph 2, clarified the relationship between the most-favoured-nation clause and material reciprocity, a question which should be given further attention by the Commission. It was also said that paragraph (e) was more of a substantive provision than a definition. Doubts were also expressed about the usefulness of paragraph (e).<sup>43</sup>

*Written comments*.<sup>44</sup>

87. *Luxembourg*. In the opinion of the Government of Luxembourg, the term "material reciprocity" concerns a secondary and atypical aspect of the clause, as can be seen from articles 8 to 10. It should therefore be excluded from the definitions in article 2.

88. *Byelorussian SSR*. In the view of the Byelorussian SSR, the use in the draft articles of the expression "material reciprocity" to indicate the acceptable conditions for granting most-favoured-nation treatment is unwarranted, because the expression is extremely imprecise.

89. The *USSR* expresses serious doubts regarding the value of introducing the term "material reciprocity" into the draft.

*Comments of international organizations*

90. *EEC*. The proposal of EEC for supplementing article 2 with a new provision is mentioned and discussed above in the paragraphs relating to article 1.<sup>45</sup>

## OPINION OF THE SPECIAL RAPPORTEUR

91. The Special Rapporteur considers that the definition of the term "material reciprocity" in paragraph (e) should be retained, since this term is used in articles 9, 10, 18, paragraph 2, and 19, paragraph 2, and is extremely important for an understanding of the substance of these articles.

92. In actual fact, the whole concept of the draft is based on the fact that, in contemporary treaty relationships between States, use is made of two types of most-favoured-nation clause: unconditional clauses and clauses conditional upon material reciprocity.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes, agenda item 106, document A/31/370, para. 36.*

<sup>44</sup> See foot-note 20 above.

<sup>45</sup> See paras. 68 *et seq.* above.

93. In this connexion, it should be noted in particular that the application of clauses that are conditional upon material reciprocity is limited to certain spheres of relations between States, such as consular and diplomatic relations or treaties relating to establishment, that is to say, those spheres where material reciprocity is possible in practice. The Special Rapporteur would like to emphasize as forcefully as possible that, in the most traditional sphere of application of the clause, namely trade, material reciprocity is simply impossible, and the same is true in certain other spheres. However, in certain other spheres, it is appropriate and logical to use clauses that are conditional on material reciprocity.

94. The Special Rapporteur shares the doubts expressed with regard to the term "material reciprocity" itself. The term in itself is not sufficiently clear in describing a situation which, in a specific clause, could be expressed, for example, by the word "reciprocity" alone. Thus, from the point of view of clarity, it would be enough to stipulate that a State should accord the consulate of the contracting State the same privileges that it accorded to third States, on the basis of reciprocity. However, although he does not consider the term "material reciprocity" to be fully adequate, the Special Rapporteur cannot suggest anything better. Thus, in his view, the term "effective reciprocity", which is to be found in some clauses, is no more satisfactory than the term "material reciprocity" in the context of these draft articles. In the opinion of the Special Rapporteur, the fact that paragraph (e) gives the definition of the term "material reciprocity" means that the concept expressed by the term is more important than the term itself.

95. With respect to the actual definition in paragraph (e), the least satisfactory—and, to some extent, doubtful element—is the term "equivalent treatment". The Commission might consider the possibility of replacing this term with the expression "the same treatment" or "similar treatment". However, the Special Rapporteur is not sure whether this is the best solution to the problem.

96. Accordingly, the Special Rapporteur considers that it would be advisable not to alter the substance of article 2, paragraph (e).

97. Paragraph (e) is merely a description of what is contained in specific clauses and what is referred to, at present, as "material reciprocity". What is meant by material reciprocity in specific instances will be seen from the text of the clauses themselves.

98. Unfortunately, the Special Rapporteur is unable to suggest anything more satisfactory than "material reciprocity" and "equivalent treatment". and he leaves the question of the use of these terms in the draft articles open.

### *Article 3. Clauses not within the scope of the present articles*

#### *Comments of States*

##### *Oral comments*

99. According to the 1976 report of the Sixth Committee, some representatives said that this article could be retained although its object was covered by article 1 and by the norms of general international law.<sup>46</sup>

##### *Written comments*<sup>47</sup>

100. *Luxembourg* considers that the meaning of this article is difficult to comprehend. If the artificial restrictions could be removed from article 1, then article 3 could also be deleted without any difficulty.

#### OPINION OF THE SPECIAL RAPPORTEUR

101. Article 3 is what is called a saving clause. It reflects generally accepted provisions of international law. The Special Rapporteur considers that it would be advisable to retain article 3 in its present form.

### *Article 4. Most-favoured-nation clause*

#### *Comments of States*

##### *Oral comments*

102. According to the 1976 report of the Sixth Committee, some representatives expressed the view that article 4 should state explicitly that it was a question of a relationship between States deriving from the valid terms of a treaty in force, because there were many treaties concluded in historical circumstances which no longer prevailed. The opinions were also expressed that articles 4 and 5 should be combined in a single article and that the provisions of those two articles should be incorporated in article 2 so as not to detract from the traditional importance of definitions.<sup>48</sup>

##### *Written comments*<sup>49</sup>

103. *Luxembourg*. In the view of the Government of Luxembourg, this provision would be more suit-

<sup>46</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes, agenda item 106, document A/31/370, para. 37.*

<sup>47</sup> See foot-note 20 above.

<sup>48</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes, agenda item 106, document A/31/370, para. 38.*

<sup>49</sup> See foot-note 20 above.

ably included among the definitions in article 2. As a separate article, it gives the impression of being completely tautological.

104. The Government of Luxembourg also emphasized the importance for the draft as a whole of the expression "in an agreed sphere of relations".

#### OPINION OF THE SPECIAL RAPPORTEUR

105. In its 1976 report, the Commission pointed out (para. 58) that the first seven articles of the draft might be considered as introductory articles of a definitional nature.<sup>50</sup> This is quite logical, since it is essential to define the subject-matter of the clauses before describing their general legal consequences. However, in the context of this draft, article 4 is more of a substantive article than a simple definition.

106. It is clearly unnecessary to introduce greater precision in article 4 in order to indicate the scope of the clause, since the scope of the clause is one of the topics dealt with in article 7 of the draft.

107. Accordingly, the Special Rapporteur considers that it would be advisable to retain article 4 in its present form.

#### *Written observations*<sup>51</sup>

108. *Czechoslovakia.* Czechoslovakia observes that articles 4 and 5 have basic significance for the draft and that the contents of the most-favoured-nation clause should follow from them. It is proper to consider whether it would not be expedient to connect the two articles and harmonize them in order to make their interpretation easier. Certain interpretation difficulties may arise in connexion with the fact that the term "treatment" is used in both of the said articles but in a different sense. Article 4 deals only with the granting of "most-favoured-nation treatment to another State", and the purpose of this wording is clearly to stipulate the subjects of rights and obligations from the most-favoured-nation clause, i.e. the contracting States. Article 5 deals with treatment accorded "to the beneficiary State or to persons or things", and its purpose is to delimit the contents of the most-favoured-nation clause.

109. In the opinion of the Czechoslovak Government, the proposed wording of articles 4 and 5 does not correspond to some conclusions contained in the commentary on the articles, particularly in paragraph 13 of the commentary on article 4.

#### OPINION OF THE SPECIAL RAPPORTEUR

110. The Special Rapporteur feels that it would be inadvisable to combine draft articles 4 and 5.

111. The Special Rapporteur will try to take account of comments relating to the commentary when he prepares it in its final version.

### *Article 5. Most-favoured-nation treatment*

#### *Comments of States*

#### *Oral comments*

112. According to the 1976 report of the Sixth Committee, the opinion was expressed that articles 5 and 7 should be reviewed to take into account the fact that a beneficiary State should not automatically be entitled, under a most-favoured-nation clause, to all the privileges enjoyed by the third State when, owing to the existence of a special relationship between the granting and third States, the extension of those privileges to the third State in a particular field was something more than an act of commerce.<sup>52</sup>

#### *Written comments*<sup>53</sup>

113. *The Byelorussian SSR* expressed its satisfaction with the definition of most-favoured-nation treatment.

114. *The USSR* considers that one of the merits of the draft articles prepared by the Commission is that they clearly reflect the concept of most-favoured-nation treatment as generally accepted in contemporary international law.

115. *Luxembourg.* The Government of Luxembourg expressed doubt as to whether it was even possible to establish a general definition of most-favoured-nation treatment. In its opinion, it is particularly difficult to explain the meaning of the terms "persons" or "things" which are in a "determined relationship" with a given State. Thus, while the situation may be clear enough in the case of physical persons, it is not clear in the case of economic enterprises, whether or not corporate bodies. Does the reference to "things" apply only to material objects or also to intangible goods such as intellectual property rights?

#### OPINION OF THE SPECIAL RAPPORTEUR

116. The oral comment referred to above concerning a special relationship between two States which should constitute an exception to the operation of the clause clearly relates to special historical privileges enjoyed by one State in the territory of another State.

117. In the view of the Special Rapporteur, such rare and exceptional cases, should they occur, are normally regarded as exceptions to the most-

<sup>50</sup> *Yearbook ... 1976*, vol. II (Part Two), p. 11, para. 58.

<sup>51</sup> See foot-note 20 above.

<sup>52</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 39.

<sup>53</sup> See foot-note 20 above.

favoured-nation clause. However, it would hardly seem appropriate to devote a special provision to such an exception in this draft.

118. With regard to the specific meaning of the terms "persons", "things" and "in a determined relationship" (with a given State), the real meaning of these terms in each case can be established only in the context of the specific clause concerned. In this connexion, it is quite possible that more or less serious problems will arise in connexion with the interpretation of a given specific clause, as sometimes occurs, too, in actual practice. However, this problem concerns existing treaty provisions on most-favoured-nation treatment rather than this draft.

119. Accordingly, the Special Rapporteur considers that it would be advisable to retain article 5 in its present form.

*Written comments*<sup>54</sup>

120. *Guyana*. The Government of Guyana believes that, in article 5, the most-favoured-nation clause is stated in absolute terms and takes as its starting point the "quantum" of benefit enjoyed by the third State, the *tertium comparationis*. This starting point ignores the fact that there may be other considerations, e.g. a special relationship, which influence the granting of most-favoured-nation treatment in a certain area, making it more than an act of mere commerce, and that the potential beneficiary State should at least be in a position of equivalence with the third State before it should properly claim all the benefits enjoyed by that third State under a most-favoured-nation clause.

OPINION OF THE SPECIAL RAPPORTEUR

121. The Special Rapporteur believes that, in very rare and exceptional cases, most-favoured-nation treatment obviously can be granted on some basis other than a treaty provision. However, such exceptional cases should not be dealt with in the draft articles.

122. The Special Rapporteur feels that it would be advisable to retain the present wording of article 5.

**Article 6. Legal basis of most-favoured-nation treatment**

*Oral comments*

123. According to the 1976 report of the Sixth Committee, the view was expressed in support of the article that its provisions recognized the principle of the sovereignty and liberty of action of States.<sup>55</sup>

<sup>54</sup> *Ibid.*

<sup>55</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes, agenda item 106, document A/31/370, para. 40.*

*Written comments*<sup>56</sup>

124. *Luxembourg* pointed out that article 6 states a legal truth of a general nature and could therefore easily be deleted.

OPINION OF THE SPECIAL RAPPORTEUR

125. The article does indeed state an obvious rule of international law, and therein lies its value. The Special Rapporteur considers that it would be useful to retain the article in its present form.

**Article 7. The source and scope of most-favoured-nation treatment**

*Comments of States*

*Oral comments*

126. In the opinion of the Special Rapporteur, the comments made in respect of articles 5 and 7 in the 1976 report of the Sixth Committee<sup>57</sup> do not apply to article 7.

*Written comments*<sup>58</sup>

127. *Luxembourg*. The Government of Luxembourg questioned the argument underlying this article, an argument based on a distinction between a right which "arises" from the clause (para. 1 of the article) and the way in which the right is "determined" (para. 2 of the article). It noted that, in fact, the clause creates only a conditional obligation, the condition depending upon the favours that may subsequently be extended to a third State. It may therefore be going too far to say, as in paragraph (1) of the Commission's commentary, that the clause is the "exclusive" source of the beneficiary State's rights.

OPINION OF THE SPECIAL RAPPORTEUR

128. The Special Rapporteur fully shares the opinion expressed by the Commission in its commentary that the article sets out the basic principles of the operation of the clause. Paragraph 1 of the article establishes that *the right of the beneficiary State to most-favoured-nation treatment* arises only and exclusively on the basis of the clause in force, in other words, only on the basis of a treaty which is in force and which contains the clause. In this draft, of course, the Commission is not concerned with the conditions governing the validity of the clauses or of treaties containing them, since this is dealt with in

<sup>56</sup> See foot-note 20 above.

<sup>57</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes, agenda item 106, document A/31/370, para. 39.*

<sup>58</sup> See foot-note 20 above.

the Vienna Convention. Thus, the right to a given type of treatment is not in itself conditional. An unconditional right arises as soon as a clause enters into force.

129. However, *the treatment itself*, the right to which is acquired through the clause, is “conditional”, or, rather, is subject to change, since it is determined by the treatment accorded to the third State or, to some extent, to persons and things related to that State. This is the topic dealt with in paragraph 2 of the article.

130. Accordingly, the Special Rapporteur considers that it would be advisable to retain article 7, with some drafting changes to clarify paragraphs 1 and 2.

131. In the light of the Commission’s commentary and the points raised above, the Special Rapporteur considers that the word “only” should be inserted between the words “arises” and “from”. The advisability of this drafting change is self-evident.

132. The Special Rapporteur would also like to draw the attention of the Commission to the fact that, in the English text of article 5 and of article 7, paragraph 1, the words “third State” are used with the indefinite article (“a third State”). In article 7, paragraph 2, they are used with the definite article (“the third State”). The Special Rapporteur would suggest that, in the English text of article 7, paragraph 2, the words in question should be used with the indefinite article (“a third State”). The other texts should be brought into line with the English. In the opinion of the Special Rapporteur, the advisability of this drafting change is also self-evident.

#### *Written comments*<sup>59</sup>

133. *Colombia.* Colombia notes that the article lays down, as the basis of the beneficiary State’s right to most-favoured-nation treatment, “the most-favoured-nation clause in force between the granting State and the beneficiary State”. Logically, however, the term “in force” used here defines neither the prerequisite nor the effects of the rule in question. Indeed, if a treaty between the granting State and the beneficiary State regulated the content and scope of the most-favoured-nation clause, there would be no grounds whatever for referring to a relationship between the granting State and a third State.

134. This view is confirmed by article 18 of the draft, which states that the right of the beneficiary State to any treatment under a most-favoured-nation clause not made subject to the condition of material reciprocity “arises at the time when the relevant treatment is extended by the granting State to a third State”. However, there is no direct reference to the basic treaty as the source of the right, the substance of which is defined by the treatment accorded by the granting State to a third State.

135. In view of the above, the Government of Colombia proposes that the words “in force” in ar-

title 7, paragraph 1, should be replaced by “agreed”. The structure of this article could also be made more logical if the end of the sentence were amended to read (as a variant, retaining the words “in force”): “... the most-favoured-nation clause in force between the granting State and the third State”.

#### OPINION OF THE SPECIAL RAPPORTEUR

136. The Special Rapporteur considers that article 7, paragraph 1, indicates quite clearly that the sole source of the beneficiary State’s rights to most-favoured-nation treatment is the most-favoured-nation clause in force between that beneficiary State and the granting State. It is, of course, assumed that the clause—which is by definition a provision of a treaty—is in force, in as much as the treaty containing the clause is in force. The clause may, in addition, be applicable if there are any *direct* relationships covered by the clause between the granting State and the third State. This point is also reflected in article 7.

137. The Special Rapporteur therefore considers it would not be advisable to make the proposed amendments to article 7, paragraph 1.

#### *Article 8. Unconditionality of most-favoured-nation clauses*

##### *Comments of States*

##### *Oral comments*

138. According to the 1976 report of the Sixth Committee, doubts were expressed as to the reservation in article 8 whereby the parties could agree to make the application of the clause subject to certain conditions. It was stated that clauses made conditional upon material reciprocity were not conducive to the unification and simplification of international relations. The view was also expressed, in connexion with paragraph (24) of the Commission’s commentary to articles 8, 9 and 10, that the draft articles, by acknowledging the necessity of establishing equivalence, would offer the most disadvantaged countries an invaluable asset in their negotiations with their more developed counterparts.<sup>60</sup>

#### OPINION OF THE SPECIAL RAPPORTEUR

139. The Special Rapporteur would like to emphasize once again the point made above,<sup>61</sup> namely, that the draft as a whole, and articles 8, 9 and 10 in particular, are based on the fact that there are, at

<sup>60</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes, agenda item 106, document A/31/370, para. 41.*

<sup>61</sup> See paras. 92 and 93.

<sup>59</sup> *Ibid.*



present, two types of clauses: unconditional clauses and clauses conditional upon material reciprocity. In this connexion, clauses conditional upon material reciprocity can be used and are advisable only for certain types of relations; in some spheres, such as trade, their use is simply impossible.

140. The Special Rapporteur suggests that article 8 should be retained in its present form.

**Article 9. Effect of an unconditional most-favoured-nation clause**

141. There are no comments on this article.

OPINION OF THE SPECIAL RAPPORTEUR

142. The Special Rapporteur suggests that article 9 should be retained in its present form.

**Article 10. Effect of a most-favoured-nation clause conditional on material reciprocity**

*Comments of States*

*Written comments*<sup>62</sup>

143. *Luxembourg.* The Government of Luxembourg recommends the deletion of article 10 on the grounds that it is merely a truism.

144. It expresses doubts about the advisability of introducing here the idea of "reciprocity" which, in its view, is ambiguous. What is involved here is less a question of reciprocity than one of "compensation" or material "equivalent".

OPINION OF THE SPECIAL RAPPORTEUR

145. The Special Rapporteur shares the view that the provisions of article 10 are sufficiently obvious. Nevertheless, he would consider it advisable to retain the article in the draft.

146. In connexion with the question of the term "material reciprocity"<sup>63</sup>, the Special Rapporteur would like to refer the Commission to the comments relating to article 2, paragraph (e), above and to remind it that the Special Rapporteur would prefer to leave the question of that term open.

147. The Special Rapporteur would also like to draw the Commission's attention to the fact that *the acquisition of the right to most-favoured-nation treatment*, which forms the substance of article 10, is closely related to the similar substance of article 7,

paragraph 1. He suggests that it might be preferable, in this article, to speak of the acquisition of the right *to enjoy most-favoured-nation treatment*.

*Written comments*<sup>64</sup>

148. *Hungary.* The Hungarian Government feels that the inclusion of the concept of material reciprocity in a treaty raises certain problems in so far as the draft fails to consider the fact that, under contemporary international law, material reciprocity is applicable only in certain non-commercial fields. Its application under trade agreements, on the other hand, may give rise to discrimination. In view of this, the inclusion of material reciprocity in the draft raises uncertainties of interpretation of the different articles and might prejudice non-discrimination in the application of the most-favoured-nation clauses in commercial relations. Therefore, the Hungarian Government believes that the best solution would be offered if the Commission, in keeping with its position expressed in its commentaries to the articles concerned, provided a formulation of the most-favoured-nation principle which would state explicitly that the concept of material reciprocity is not linked to the principle of the most-favoured-nation treatment in the case of its application in commercial relations.

149. The *Ukrainian SSR* considers that the term "material reciprocity", used to designate the conditions under which most-favoured-nation treatment is granted, gives rise to doubts. As the term is extremely vague, it allows various interpretations, including a broad one. A broad interpretation could render meaningless the very principle of most-favoured-nation treatment.

OPINION OF THE SPECIAL RAPPORTEUR

150. The Special Rapporteur entirely concurs with the view that material reciprocity is applicable in only a few spheres of relations between States. It is, for instance, virtually impossible to apply it to commerce and many other fields. However, the draft is based on the assumption, which the Commission feels is fully justified by international usage, that in modern treaty practice two sorts of most-favoured-nation clause are in use: the unconditional clause, and the clause conditional on material reciprocity. The text adopted by the Commission derives from this usage. Within the framework of the draft, however, it cannot be shown in which fields material reciprocity is possible, and in which it is not. For the purposes of the draft, this is unnecessary since the draft is concerned with certain legal effects of the clause, and not with the clause itself.

151. In the opinion of the Special Rapporteur, the term "material reciprocity" used in the draft, in so

<sup>62</sup> See foot-note 20 above.

<sup>63</sup> See paras. 85-98.

<sup>64</sup> See foot-note 20.

far as it is defined in article 2 (e), is specific enough not to admit of different interpretations. However, he would still prefer to leave open the question of whether it is advisable to use this particular term.

*New article 10 bis. Effect of a most-favoured-nation clause under special conditions of reciprocity on exchanges of goods and services between countries with different socio-economic systems*

*Comments of international organizations*

152. EEC.<sup>65</sup> The Community considers that relations between countries with different socio-economic systems are governed by certain rules. The special conditions prevailing in the economies of countries in which the State enjoys a monopoly of trade mean that most-favoured-nation treatment is without real effect unless the conditions in which it is accorded are specified. This simply means that it is necessary to recognize the existing difference in trade conditions which result from the differences between economic systems. Real reciprocity in advantages should be measured in terms of concrete, comparable results, e.g. increases in the volume and variety of trade between countries with different economic systems to the satisfaction of the trading partners.

153. In the light of these and other considerations it has advanced, EEC would prefer to see the draft take fuller account of the concern felt and the experience acquired by the Community and its member States vis-à-vis countries with different socio-economic systems. In that connexion, it would like the provisions concerning commercial exchanges in the Final Act of the Conference on Security and Co-operation in Europe to be taken into account.<sup>66</sup>

154. The Community therefore proposes that the draft articles should be supplemented by an article to be placed after article 10, the title and text of which would be as follows:

*“Effect of a most-favoured-nation clause under special conditions of reciprocity on exchanges of goods and services between countries with different socio-economic systems.*

“Nothing in these articles shall be construed as obliging the conceding State to grant most-favoured-nation treatment to the beneficiary State in respect of exchanges of goods and services between countries with different socio-economic systems, unless the beneficiary State accords to the conceding State a status permitting, on the basis of equality and mutual satisfaction of the partners, as a whole, an equitable distribution of advantages and obligations of comparable scale, in accordance with bilateral and multilateral agreements.”

<sup>65</sup> See *Yearbook ... 1978*, vol. II (Part Two), p. 179, document A/33/10, annex, sect. C, subsect. 6.

<sup>66</sup> For reference, see foot-note 17 above.

OPINION OF THE SPECIAL RAPPORTEUR

155. The Special Rapporteur has his own view, which differs from that of the Community, with regard to the advantages, particularly in the field of international trade, enjoyed by States with planned economies vis-à-vis States with market economies. He does not, however, consider it would be appropriate to discuss the question within the context of the present articles.

156. He also feels that the provision of the Final Act of the Conference on Security and Co-operation in Europe which the Community uses in its proposed formulation of the article has no direct relevance to relations between States on the basis of the most-favoured-nation clause.

157. In his opinion, in the section of the Final Act, on “Co-operation in the Field of Economics, of Science and Technology and of the Environment”, the participating States outlined the general desirable conditions for such co-operation. In the provision referred to above, they recognized, *inter alia*, that

such co-operation, with due regard for the different levels of economic development, can be developed, on the basis of equality and mutual satisfaction of the partners, and of reciprocity permitting, as a whole, an equitable distribution of advantages and obligations of comparable scale, with respect for bilateral and multilateral agreements.

158. General desirable conditions for economic co-operation between States are also outlined today in many other international instruments, including the Charter of Economic Rights and Duties of States.<sup>67</sup>

159. The basic intent of the proposed article 10 *bis* is clearly to establish that the articles drafted by the Commission do not in themselves oblige a conceding State to grant most-favoured-nation treatment to a beneficiary State in one particular field.

160. In the opinion of the Special Rapporteur, the text of this article can be interpreted in another way, namely, that if the condition stipulated in the article is met, the conceding State will be obliged to grant most-favoured-nation treatment to the beneficiary State in that particular field of relations. However, the proposed provision does not conform to the spirit and letter of the draft articles either in the first case, or, still less, in the second.

161. In fact, according to articles 1, 4, 6 and 7, the right of a beneficiary State to receive most-favoured-nation treatment arises solely and exclusively as a result of a most-favoured-nation clause in effect between the granting State and the beneficiary State. As a result, neither the conditions set out in the draft articles nor, still less, any other conditions, can oblige any State to accord most-favoured-nation treatment to another State.

162. In its draft, the Commission proceeds on the assumption that, in modern treaty relations between States, two forms of the clause are used: unconditional clauses and clauses conditional on material re-

<sup>67</sup> General Assembly resolution 3281 (XXIX).

reciprocity. This, of course, does not prevent States from establishing their relations on the basis of a different sort of clause, for example, clauses conditional on factors other than material reciprocity.

163. Judging from the title of the proposed article 10 *bis*, it is intended to deal with this third sort of conditional clause. In such a case, however, the conditional clause goes beyond the assumption underlying the draft; in other words, it exceeds the scope of the present draft.

164. For the above reasons, the Special Rapporteur believes that it would be inadvisable to include the proposed article 10 *bis* in the draft.

**Article 11. Scope of rights under a most-favoured-nation clause**

*Comments of States*

*Oral comments*

165. In the Sixth Committee in 1976, the view was expressed that the threefold condition of similarity of subject-matter, category of persons or things and relationship with the beneficiary State and a third State, which must be fulfilled under articles 11 and 12, was in keeping with the free will of the parties and with judicial practice.<sup>68</sup>

OPINION OF THE SPECIAL RAPPORTEUR

166. The Special Rapporteur suggests that the article should be retained as it stands.

**Article 12. Entitlement to rights under a most-favoured-nation clause**

*Comments of States*

*Written comments*<sup>69</sup>

167. *Luxembourg*. Article 11 sets forth the well-known *ejusdem generis* rule. A problem arises with regard to the relationship between this article and article 4. According to article 4, the clause applies only in "an agreed sphere of relations". According to article 11, it entitles a State only to those rights which fall within the scope "of the subject-matter of the clause". In the opinion of the Government of Luxembourg, these two conditions are cumulative. It would be desirable, in the interests of clarity, to draw attention to the fact that the *ejusdem generis* rule applies also to the aforementioned provision of article 4.

<sup>68</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 42.

<sup>69</sup> See foot-note 20 above.

OPINION OF THE SPECIAL RAPPORTEUR

168. The Special Rapporteur believes that the above comments relate to the Commission's commentaries to articles 11 and 12 and should be taken into account in the future.

169. The Special Rapporteur suggests that article 12 should be retained in its present form.

**Article 13. Irrelevance of the fact that treatment is extended gratuitously or against compensation**

*Comments of States*

*Oral comments*

170. According to the 1976 report of the Sixth Committee, some representatives supported articles 13 and 14 in general. With respect to article 13, it was said that the rule stated in that article was in conformity with modern thinking on the operation of the clause. One suggestion was made to add to the article a statement to the effect that the most-favoured-nation clause should either not mention any condition at all or should explicitly formulate such condition if a conditional clause is involved. It was also suggested that article 13 should be linked with article 8 so as to be subject to the exception contained in article 8, regarding the principle of the independence of the contracting parties.<sup>70</sup>

*Written comments*<sup>71</sup>

171. *Luxembourg*. The Government of Luxembourg feels that article 13 duplicates articles 8 and 9, concerning the unconditionality of the clause.

OPINION OF THE SPECIAL RAPPORTEUR

172. The Special Rapporteur shares the view that the clauses relating to most-favoured-nation treatment and, where appropriate, conditions concerning material reciprocity should be formulated in a more explicit, more rational and more exhaustive manner. However, this problem, which concerns the parties to treaties containing such a clause, is outside the scope of these draft articles.

173. The Special Rapporteur feels that the subject-matter of articles 8, 9 and 10 and of article 13 is not the same. Articles 8, 9 and 10 deal with the clauses themselves and whether they are unconditional or conditional on material reciprocity. The subject-matter of article 13 is the treatment extended to a third State, the irrelevance to the beneficiary State of the fact that such treatment is extended to a third State gratuitously or against compensation.

<sup>70</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 43.

<sup>71</sup> See foot-note 20 above.

174. The Special Rapporteur therefore feels that it would be advisable to retain article 13 in its present form.

**Article 14. Irrelevance of restrictions agreed between the granting and third States**

*Comments of States*

*Written comments*<sup>72</sup>

175. *Luxembourg.* In the view of the Government of Luxembourg, the wording of this article is difficult to understand. It seems that the intention is to present a simple idea, namely, that a State may not limit the scope of the clause, to the detriment of the beneficiary, as the result of an agreement concluded with a third State. This simple truth was stated more comprehensibly in the resolution adopted by the Institute of International Law quoted in paragraph (2) of the Commission's commentary. It would be better to use that formulation.

OPINION OF THE SPECIAL RAPPORTEUR

176. The Special Rapporteur fully agrees that the article presents the simple idea referred to in the aforementioned comment. He would, however, like to support the present wording of article 14, which seems to him clearer than the corresponding provision of the resolution of the Institute of International Law.

177. The Special Rapporteur therefore feels that it would be advisable to retain article 14 in its present form.

**Article 15. Irrelevance of the fact that treatment is extended under a bilateral or a multilateral agreement**

*Comments of States*

*Oral comments*

178. According to the 1976 report of the Sixth Committee, in relation to article 15, representatives addressed themselves to the question whether or not the most-favoured-nation clause attracts benefits granted within customs unions and similar associations of States.<sup>73</sup>

179. Many representatives agreed that the Commission had been right not to attempt to formulate a rule establishing a general exception to the principle of application of the most-favoured-nation clause in the case of customs unions and other associations of States.<sup>74</sup> In the opinion of some representatives, there

was no general rule of contemporary international law providing for the exclusion of the benefits granted within a customs union from the scope of application of the most-favoured-nation clause. The fact that particular agreements contained provisions making specific exceptions to the operation of the clause confirmed the absence of a rule to that effect.<sup>75</sup>

180. In the opinion of some representatives, the question was one which should be solved through agreements between the States concerned, for practice had shown that in that way solutions could be found to all complicated problems arising when the obligations deriving from the clause were to be harmonized with those deriving from membership in a customs union or economic community.<sup>76</sup>

181. Many other representatives were of the view that the draft should allow for an exception from the operation of the clause in the cases of customs unions, free-trade areas and other similar associations of States. Regional integration was an increasingly important reality reflecting a special relationship of an objective character which did not come under the influence of the clause.<sup>77</sup> It was emphasized that the question did not concern only EEC or other such associations of developed States, but affected all regional groupings.<sup>78</sup> It was stated that one reason for not applying the clause to customs unions and similar associations was the difference in the degree of freedom which States enjoyed according to whether or not they were members of such groups.<sup>79</sup>

182. Several representatives supported the inclusion in the draft of an exception to the operation of the clause for customs unions or other similar associations when their members were developing States. It was said in this respect that exceptions for customs-union agreements among developed countries were contrary to the principles of preferential and differentiated treatment of developing countries.<sup>80</sup>

183. A number of representatives supported the inclusion of a customs-union exception with particular reference to EEC.<sup>81</sup>

184. In the Sixth Committee in 1977, it was stated that the Commission should keep in mind situations involving new and more extensive modes of co-operation between countries with like interests. Any integration process, whether regional, subregional or between neighbouring States, should automatically be considered an exception to the application of the most-favoured-nation clause.<sup>82</sup>

<sup>75</sup> *Ibid.*, para. 47.

<sup>76</sup> *Ibid.*, para. 49.

<sup>77</sup> *Ibid.*, para. 51.

<sup>78</sup> *Ibid.*, para. 53.

<sup>79</sup> *Ibid.*, para. 54.

<sup>80</sup> *Ibid.*, para. 55.

<sup>81</sup> *Ibid.*, paras. 56 and 57.

<sup>82</sup> *Ibid.*, *Thirty-second Session, Annexes*, agenda item 112, document A/32/433, para. 191.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 44.

<sup>74</sup> *Ibid.*, para. 45.

*Written comments*<sup>83</sup>

185. The *Byelorussian SSR* and the *USSR* consider the exceptions to the clause provided for by the Commission in draft articles 21 to 23 to be the only ones justified.

186. The *German Democratic Republic* feels that exceptions from the application of most-favoured-nation treatment must not be permitted to rob the clause of its value. The exceptions provided for by the Commission in draft articles 21, 22 and 23 fulfil this requirement. No other exceptions should be provided for, including exceptions relating to customs unions or economic communities. Such problems should be solved by agreement between the States members of such a community and the beneficiaries of the clause. Mutual interests are better served in this manner; this is also in conformity with the spirit of article 12 of the Charter of Economic Rights and Duties of States.<sup>84</sup>

187. *Luxembourg*. The Government of Luxembourg stated that article 15 does not in itself call for comment. However, the Commission chose to consider in the commentary to article 15 (paras. (24) *et seq.*) the question whether the most-favoured-nation clause does or does not attract benefits accorded within Customs unions and similar associations of States. It is regrettable that this problem, which is one of the major problems raised by the clause, could not be solved.

188. The Government of Luxembourg was surprised that the report of the Commission makes no reference to the resolution adopted by the Institute of International Law at its Edinburgh session in 1969, which affirms, *inter alia* that:

States to which the clause is applied should not be able to invoke it in order to claim a treatment identical with that which States participating in an integrated regional system concede to one another.<sup>85</sup>

189. The Government of Luxembourg feels that this approach is the only one which is in conformity with universal practice and can accommodate the differences in quality and nature existing between economic integration systems and international trade. Whereas a large number of economic integration systems have been functioning since the nineteenth century, parallel with the most-favoured-nation clause mechanism, there is no known precedent of a State demanding and obtaining, by virtue of the clause, the advantages of a customs-union or free-trade system of which it was not a member. The frequency of explicit exceptions in treaty practice referred to in the Commission's commentary, such as article XXIV of GATT, show only that practice is uniform.

190. *Sweden*. The Government of Sweden holds the view that an exception from the general rule in re-

spect of customs unions and free-trade areas should be included in the draft articles. Such an exception has been included in the General Agreement on Tariffs and Trade<sup>86</sup> and in numerous bilateral treaties. It cannot be considered reasonable that a State which is not a member of a customs union or is not included in a free-trade area should be entitled, on the basis of a most-favoured-nation clause, to claim special benefits resulting from the customs union or free-trade agreement. A customs union or a free-trade agreement entails a number of rights as well as obligations for the States involved, and these rights cannot be separated from the obligations. The parties to a treaty containing a most-favoured-nation clause do not normally intend the clause to be applicable to benefits which either of them might subsequently grant to another State in connexion with the establishment of a customs union or free-trade area. An exception for such cases should therefore normally be considered to be implicit in the most-favoured-nation clause and this should be reflected in the draft articles.

191. *Hungary*. The Hungarian People's Republic considers the provisions of article 15, which, in full accordance with the correct principles of codification, seeks the broadest possible application of the most-favoured-nation treatment, to be appropriate and important.

192. *Guyana*. The Government of Guyana comments that the draft makes no provision for customs unions and other similar forms of association to be an exception to the clause, notwithstanding the frequency of their use in some form or other by several countries, but especially by developing countries, as an instrument of economic development. It feels that the draft articles could benefit from the inclusion of this exception.

*Comments of international organizations*

193. The *secretariat of GATT*<sup>87</sup> agreed that the application of the clause with respect to some of the issues that arise in the field of international trade would seem to require the reconciliation of diverging interests through negotiations in specialized organizations which therefore do not lend themselves easily to codification. It noted further that the proposed articles would apply only to future treaties embodying a most-favoured-nation clause and that States would remain free to agree on different provisions. The proposed articles would therefore not alter the existing law on GATT and would preserve the freedom of the contracting parties to GATT to negotiate any changes in this law. The Commission's draft does not refer to customs unions, free-trade areas and similar groupings. However, the secretariat of GATT

<sup>83</sup> See foot-note 20 above.

<sup>84</sup> General Assembly resolution 3281 (XXIX).

<sup>85</sup> *Annuaire de l'Institut de droit international*, 1969 (Basel), vol. 53, vol. II, p. 362.

<sup>86</sup> General Agreement on Tariffs and Trade. Text in GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No. GATT/1969-1).

<sup>87</sup> See *Yearbook ... 1978*, vol. II (Part Two), p. 178, document A/33/10, annex, sect. C, subsect. 3.

assumed that in its further work the Commission would take into account the developments that have taken place in this area.

194. *The Economic Commission for Western Asia*<sup>88</sup> notes that draft article 15 could be interpreted as the obligation to extend to third countries the advantages enjoyed by members of a customs union. If an ECWA country should conclude a trade agreement with any country outside the customs union, it might be legally obliged to apply to imports from that country the same treatment as is granted to other members of the customs union. A possible way to avoid this would be to make the most-favoured-nation clause conditional, including a phrase stating that it does not refer to the intra-customs union treatment. This measure was included in all three of the EEC agreements with Jordan, Lebanon and Syria, in which these ECWA countries committed themselves to granting most-favoured-nation treatment to imports from EEC. If article 15 were to remain unchanged, ECWA countries would have to recognize its implications and make most-favoured-nation clauses conditional.

195. *The Board of the Cartagena Agreement*<sup>89</sup> considers that the advantages provided for in an integration agreement cannot be invoked by States benefiting from the most-favoured-nation clause, as might be understood from the text of article 15. The Board is therefore in favour of making exceptions to the general rule in the cases of customs unions and free-trade areas, as is done in the General Agreement on Tariffs and Trade.

196. *European Free Trade Association*.<sup>90</sup> EFTA feels that, in view of the importance of regional economic integration, free-trade areas and customs unions are generally recognized exceptions to the most-favoured-nation treatment of trade. In the opinion of EFTA, therefore, the draft articles should be supplemented by a provision which explicitly recognizes such exceptions, as does article XXIV of GATT.

197. *EEC*.<sup>91</sup> The Community feels that article 15 could be interpreted as meaning that, under the most-favoured-nation clause, the advantages which the States members of a customs union grant among themselves by virtue of that union should be extended to third countries. It also considers that article 16 would imply that the mutual non-discriminatory commitments granted to each other by States members of a customs union should be extended to third countries.

198. In its opinion, the argument of the Special Rapporteur (Professor Endre Ustor) that there is no customary rule under international law which would implicitly exclude customs unions from the effects of the clause is not adequate. Customs unions are regarded in the doctrine and practise of States as automatically exempt from the normal application of the

most-favoured-nation clause. Moreover, even if no such exception existed either in a customary rule or in modern State practice, an exemption would have to be established under international law both for the industrialized and the developing countries.

199. Consequently, the Community suggests that draft articles 15 and 16 should be supplemented by an article 16 *bis*, which would read as follows:

*"Effects of the clause on rights and obligations established within economic and other unions*

*"Notwithstanding articles 15 and 16, the present articles shall not affect rights and obligations which are established within entities in the sense of article 2, in particular economic unions, customs unions or free-trade areas, and which confer benefits or impose responsibilities on the members of such entities."*

#### OPINION OF THE SPECIAL RAPPORTEUR

200. The Special Rapporteur feels that the question of customs unions, free-trade areas and similar associations of States, in the broad sense of economic unions of States, is not directly related to the subject-matter of article 15. Economic unions of States are obviously established on the basis of bilateral or multilateral agreements, but there is more to them than that. The Commission has undoubtedly always clearly understood this.

201. The Special Rapporteur considers that article 15 in itself does not call for any comment and he suggests that it should be retained in its present form.

202. Undoubtedly, the question of customs unions and similar associations of States was considered by the General Assembly and in the written comments of States and international organizations in connexion with article 15 only because the Commission considered it in its commentary, which now appears to be inadequate. In fact, this question is part of the problem of the existing or possible general exceptions to the clause reflected in draft articles 21, 22, 23 and 27. The Special Rapporteur also feels that, in referring to customs unions and similar associations of States in the commentary, the Commission also has in mind the more general case of economic unions between States, which it would therefore be advisable to refer to specifically.

203. The Special Rapporteur considers that very convincing, even irrefutable, arguments can be adduced to support the view that the functioning of any specific economic union of States is incompatible with the obligations assumed by its members, under the clause, concerning matters relating to international trade. Among other things, the many corresponding exceptions provided for in clauses or in treaties now in effect which include such clauses testify to this.

204. However, in the opinion of the Special Rapporteur, all this is not convincing proof that in international law there is a generally recognized excep-

<sup>88</sup> *Ibid.*, p. 175, sect. B.

<sup>89</sup> *Ibid.*, p. 179, sect. C, subsect. 4.

<sup>90</sup> *Ibid.*, p. 184, subsect. 7.

<sup>91</sup> *Ibid.*, p. 179, subsect. 6.

tion to the clause in favour of economic unions of States, or that it is advisable to introduce one in the process of the progressive development of international law, or, finally, that the interests of any economic union of States require it.

205. The Special Rapporteur is firmly convinced that any attempts to formulate legal rules applicable to the draft articles concerning exceptions of that kind would encounter insuperable difficulties of both a theoretical and a practical nature. In this connexion, at least three fundamental problems would obviously have to be solved, namely:

1. With regard to which areas of the operation of the clause are exceptions in favour of economic unions of States necessary.

2. In favour of which specific economic unions of States and on what specific conditions should an exception to the clause be provided.

3. Is it sufficient to provide for exceptions only in favour of economic unions of States or are other unions of States or States parties to certain economic agreements in a similar situation.

206. The Special Rapporteur will attempt very briefly to state the main difficulties involved in the aforementioned problems.

207. In the commentary to article 15, it is stated that it is evident for the Commission that the "customs union issue", as the problem has been briefly called, is not a general problem of most-favoured-nation clauses, that is to say, it does not arise with regard to all existing and conceivable clauses but to clauses of the type contained in commercial treaties, especially those relating to customs duties.<sup>92</sup>

208. However, that remark is justified only in the case of a customs union as such and, obviously, a free-trade area. If we refer to other existing and possible economic unions of States, for example of the type of EEC, then it becomes obvious that exceptions are desirable, not only to clauses relating to trade but, perhaps, to clauses relating to establishment, finance, transport, transit, occupations of many different kinds, etc.

209. In short, the Special Rapporteur has not taken it upon himself to determine from which clauses exceptions should be provided in favour of any given type of economic union of States. In general, this task appears to be impossible. At the same time, a specific union of States, or, rather, its member States, can easily establish which specific existing clauses and which agreements containing such clauses should be reviewed and revised with a view to introducing certain exceptions.

210. These are the main difficulties involved in the first of the problems mentioned above.

211. In the Commission's commentary, the problem of exceptions in respect of economic unions of States is referred to as "the case of customs unions and similar associations of States". If it is a question

of indicating the inadvisability of formulating exceptions, then such a formula is adequate. Otherwise, it is necessary to establish to what specific unions the term "similar associations of States" applies.

212. In the oral and written comments on the draft articles mentioned above, reference is made to customs unions, free-trade areas, economic communities, and regional and subregional integration. The question is how to compile an exhaustive list of economic unions of States to which exceptions to clauses (of different kinds) would apply. The Special Rapporteur does not have a satisfactory answer to that question. However, it would be necessary not only to draw up a list of such unions, but to give a legal definition of each type, and also to specify the conditions which they should fulfil in order to be entitled to benefit from an exception.

213. The complexity of such a task is illustrated by GATT, article XXIV of which, for the purposes of that Agreement (and not for the broader purposes of the Commission's draft articles), gives definitions of a customs union and a free-trade area and also sets out the conditions applicable to them. In this connexion, it is important to bear in mind that in practice definitions may always prove inadequate. What, for example, is EEC? A customs union, a free-trade area, a financial union, an integration community, or all these together, and something more? Most probably the latter, and it is still constantly changing.

214. These, in short, are the main difficulties involved in the second of the problems mentioned above.

215. It may be considered that, apart from customs unions and free-trade areas, exceptions to the obligations deriving from GATT relate also to "preliminary agreements" leading to the establishment of a customs union or free-trade area. Thus, what is involved is an economic agreement of some kind.

216. The Special Rapporteur has considered economic unions of States as institutions being more than merely an agreement.<sup>93</sup> EEC, for example, is clearly not only an agreement. However, in principle, economic integration, for example, can be effected on the basis of an economic agreement and entail the need for the application of a clause with exceptions in favour of the parties to the agreement. Should certain economic agreements fall under the general exceptions to the clause and, if so, which specific agreements? The Special Rapporteur feels that, having said A, one would have to say B, and there is no knowing where to stop.

217. This is the kind of difficulty involved in the third of the problems mentioned above.

218. During the discussion of the question of customs unions and similar associations of States, for some reason the question was not raised of a State which is a contracting party to the clause and which subsequently joins an economic community of the type, for example, of a customs union.

<sup>92</sup> *Yearbook ... 1976*, vol. II (Part Two), p. 45, document A/31/10, chap. II, sect. C, article 15, para. (26) of the commentary.

<sup>93</sup> See para. 200 above.

219. Let us assume that, after State A has joined such a community, goods from State B must not enjoy the preferences given to goods from members of the community. However, thanks to State A, goods from the whole community can, on the basis of the clause, receive all the privileges which formerly only goods from State A received in the territory of State B. In short, are there recognized exceptions to the clause for contracting members of "customs unions and similar associations of States", and what are they?

220. In view of the fact that the question whether or not there are generally recognized exceptions to the clause in favour of members of customs unions and similar associations of States has been considered thoroughly and in depth by Professor Endre Ustor, the Special Rapporteur has dwelt above on another problem, namely, how far is this possible and advisable *de lege ferenda*.

221. He continues to be firmly convinced that there are insurmountable difficulties in the way as a result of the wide range of problems (clauses) covered by the draft articles and the need for a generalized (abstract) solution to them. However, in practice, in international relations, no substantial difficulties, at least of a legal nature, have arisen. When the matter needs to be developed further, clauses are reviewed and revised, naturally with the agreement of the parties concerned and in the light of their mutual interests.

222. The Special Rapporteur maintains therefore that the possible exclusion of certain unions from the effects of the clause is a special question which has no direct relevance to article 15.

223. Moreover, he still maintains that article 15 has not in itself given rise to any comments, and he suggests that it should be retained in its present form.

224. He also considers that the additional arguments and proposals regarding the exclusion of "customs unions" from the effects of the clause in no way refute the arguments he has advanced<sup>94</sup> concerning the inadvisability of attempting to formulate *de lege ferenda* provisions to deal with such exemptions.

225. Even if this aim is to be pursued *de lege ferenda*, it must unfortunately be noted that the article 16 *bis* proposed by EEC<sup>95</sup> will be of no assistance whatsoever.

226. The proposed article in fact refers to the fact that the draft articles under consideration do not deal with the reciprocal rights and responsibilities of the member States of certain economic unions. This is irrelevant to the proposed article 16 *bis*, for the draft articles do not affect those rights and responsibilities.

227. Draft article 16 *bis* does not deal with the question of the rights of the beneficiary State when the granting State is a member of such an economic union, the other members of which are third States.

228. The draft of the new article refers to rights and obligations which are established within entities in the sense of article 2, i.e. in the sense of the supplement to article 2 proposed by the Community,<sup>96</sup> under which entities exercising powers generally exercised by States would be treated in the same way as States (for the purposes of all the draft articles). In other words, it applies to entities which have supranational powers. Yet, with one obvious exception, the economic unions to which the article could apply do not have such powers.

229. As before, it would be necessary, in order to draft an exception, to determine to which economic unions that exception would apply and to give a precise legal definition of each such entity. In the opinion of the Special Rapporteur, such a task would require enormous efforts, without holding out any great chance of success.

#### **Article 16. Right to national treatment under a most-favoured-nation clause**

##### *Comments of States*

##### *Oral comments*

230. Some representatives speaking in the Sixth Committee in 1976 (para. 58 of the report) supported in general the provisions of article 16. Other representatives made comments on the article. It was said that the title and text of the article did not seem to be completely in harmony. The article was unclear as the term "national treatment" had not been defined in the draft. It was suggested that the words "unless the parties otherwise agree" should be inserted at the beginning of the article. It was stated that article 16 gave much too broad a scope to the most-favoured-nation clause and would not, in its present form, be in the interest of the vast majority of developing countries. It was said that the article assimilated the standards of national and most-favoured-nation treatment, but that the national treatment standard was invariably the highest order of treatment.<sup>97</sup>

##### *Written comments*<sup>98</sup>

231. *Luxembourg*. The Government of Luxembourg is of the view that, given the difference in nature between national treatment and most-favoured-nation treatment, it would be preferable not to confuse these two sorts of questions and to delete articles 16 and 17.

##### OPINION OF THE SPECIAL RAPPORTEUR.

232. Article 16 expresses an indisputable truth which, in principle, should follow directly from the substance of the clause as defined in article 5.

<sup>96</sup> *Ibid.*, para. 71.

<sup>97</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes, agenda item 106, document A/31/370, para. 58.*

<sup>98</sup> See foot-note 20 above.

<sup>94</sup> See paras. 200 to 221 above.

<sup>95</sup> *Ibid.*, para. 199.



233. The question of the advisability or inadvisability of developing a relationship with another State in one sphere of relations or another on the basis of most-favoured-nation treatment can be solved only in specific cases by a State in the light of existing circumstances. One can speak of standards of national treatment, since national treatment is specific and direct: it is established by the national legislation of a given State. However, no standards of most-favoured-nation treatment exist. This treatment depends on being directly extended to a third State. National treatment may also be granted directly.

234. A third State may, by agreement, be directly granted certain advantages which are more substantial than those provided under national treatment. It is therefore impossible to assess in the abstract the relative advantages of the two kinds of treatment.

235. What the parties may agree upon other than what is set out in article 16 is directly laid down in article 26. There is therefore no need to add a corresponding reference in article 16.

236. The Special Rapporteur feels it would be advisable to retain article 16 in its present form.

237. The question of the definition of the term "national treatment" should obviously be decided in the context of article 2.

*Written comments*<sup>99</sup>

238. *Guyana*. In the view of the Government of Guyana, article 16 assimilates the standard of national treatment to the standard of most-favoured-nation treatment. However, the redefinition of the trading concepts and relationships, which has been so much the preoccupation of all countries for a number of years, has not played a part in the formulation of this article. It would be beneficial to the development of the new law of international economic relations if the article reflected that preoccupation of States.

*Comments of international organizations*

239. *EEC*.<sup>100</sup> The community considers that article 16 would extend to third countries the mutual non-discriminatory commitments granted to each other by States members of a customs union.

OPINION OF THE SPECIAL RAPPORTEUR

240. It is unfortunately not clear to the Special Rapporteur what is the drift of the above opinions concerning article 16.<sup>101</sup> In particular, it is not clear to him how the provisions of article 16 would affect the mutual non-discriminatory commitments made by members of economic unions.

<sup>99</sup> *Ibid.*

<sup>100</sup> See *Yearbook ... 1978*, vol. II (Part Two), p. 179, document A/33/10, annex, sect. C, subsect. 6.

<sup>101</sup> Paras. 238–239.

241. He considers that it would be advisable to retain article 16 in its present form.

**Article 17. Most-favoured-nation treatment and national or other treatment with respect to the same subject-matter**

*Comments of States*

*Oral comments*

242. According to the 1976 report of the Sixth Committee, some representatives considered in general acceptable the provisions of articles 17, 18 and 19. With reference to article 17, the view was expressed that the article was based on the assumption that national and most-favoured-nation treatment went beyond the beneficiary State's entitlement under the international minimum standard.<sup>102</sup>

*Written comments*

243. *Luxembourg*, as noted above,<sup>103</sup> suggests that article 17, as well as article 16, should be deleted.

OPINION OF THE SPECIAL RAPPORTEUR

244. The Special Rapporteur feels that it would be advisable to retain article 17 in its present form.

**Article 18. Commencement of enjoyment of rights under a most-favoured-nation clause**

*Written comments*<sup>104</sup>

245. *Luxembourg*. Articles 18 and 19 invite no comment, except with regard to the concept of "material reciprocity" discussed earlier in the comments of the Government of Luxembourg concerning articles 2, 8 and 9.

OPINION OF THE SPECIAL RAPPORTEUR

246. The Special Rapporteur suggests that article 18 should be retained in its present form.

**Article 19. Termination or suspension of enjoyment of rights under a most-favoured-nation clause**

*Comments of States*

*Oral comments*

247. According to the 1976 report of the Sixth Committee, it was suggested that the words "to a

<sup>102</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 59.

<sup>103</sup> Para. 231.

<sup>104</sup> See foot-note 20 above.

third State" should be inserted after the word "State" in paragraph 1, for reasons of clarity, in order to bring it into line with article 18, paragraph 1.<sup>105</sup>

*Written comments*<sup>106</sup>

248. *Luxembourg* observed that the question arises whether the suspension of the treatment extended to the third State can be applied to the beneficiary State when it results from a breach of the law.

OPINION OF THE SPECIAL RAPPORTEUR

249. The Special Rapporteur considers that the question referred to above relates only to the interpretation or application of article 19. That question in turn raises another question, namely, whether a beneficiary State can, in a specific case, question the legitimacy of the conduct of the granting State or of a third State in their relations with each other.

250. The Special Rapporteur suggests that article 19 should be retained, with the drafting change proposed.

*Article 20. The exercise of rights arising under a most-favoured-nation clause and compliance with the laws of the granting State*

*Comments of States*

*Oral comments*

251. In the Sixth Committee in 1976, article 20 was supported in general by some representatives. It was said that the article protected the beneficiary State against any abuses on the part of the granting State and that its provisions constituted a prerequisite for the proper development of economic relations as a whole.<sup>107</sup>

*Written comments*<sup>108</sup>

252. *Luxembourg*. The Government of Luxembourg feels that article 20 is contrary to a general principle of international law, according to which a State may not invoke its internal legislation in order to restrict the scope of an international obligation or to release itself from it. It should at least be stated in this article that the national laws of the granting State may not be applied to the beneficiary State except when their observation has been expressly stipulated in relations with the third State.

<sup>105</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 59.

<sup>106</sup> See foot-note 20 above.

<sup>107</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 60.

<sup>108</sup> See foot-note 20 above.

OPINION OF THE SPECIAL RAPPORTEUR

253. The Special Rapporteur would like to emphasize once again that the clause does not contain any established right of a beneficiary State to any specific treatment which might be contrary to the internal legislation of the granting State. The beneficiary State is entitled to claim only treatment no less favourable than the treatment of a third State, which is in conformity with the present case and is reflected in the second sentence of the article.

254. The Special Rapporteur suggests that article 20 should be retained in its present form.

*Article 21. The most-favoured-nation clause in relation to treatment under a generalized system of preferences*

*Oral comments*

255. According to the 1976 report of the Sixth Committee, a number of representatives supported article 21 in its present form as being in conformity with the efforts made by the international community to relieve the flagrant imbalance between developed and developing countries.<sup>109</sup>

256. Some representatives were of the opinion that it was not possible to include in the draft, at the present time, any rules other than those contained in article 21 in favour of the developing countries.<sup>110</sup>

257. Many of the representatives who supported article 21 did so because the objective of the system of generalized non-reciprocal non-discriminatory preferences was to give developing countries access to markets of developed countries for their manufactured and semi-manufactured products and to promote their economic development.<sup>111</sup>

258. A number of considerations were put forward to the effect that the wording required further study, since it was not quite clear how generalized the system of preferences should be in order to qualify for the exception provided in article 21.<sup>112</sup>

259. With regard to the preferential treatment given to developing countries by developed countries other than within the generalized system of preferences, it was recalled that the Tokyo Declaration<sup>113</sup> had set forth the basis for the multilateral trade negotiations consecrating a new principle to secure additional advantages for the developing countries: the principle of differentiated or more favourable treatment. In that connexion, a suggestion was made to amend article 21 to read:

<sup>109</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 62.

<sup>110</sup> *Ibid.*, para. 63.

<sup>111</sup> *Ibid.*, para. 65.

<sup>112</sup> *Ibid.*, para. 64.

<sup>113</sup> Declaration of Ministers, adopted on 14 September 1973. For text, see GATT, *Basic Instruments and Selected Documents, Twentieth Supplement* (Sales No. GATT/1974-1), p. 19.

"A beneficiary State is not entitled under a most-favoured-nation clause to any treatment of a preferential or differentiated nature extended by a developed granting State to a developing third State."<sup>114</sup>

260. It was felt that the Commission, in view of its role to promote the progressive development of international law, should take into account the broad consensus which existed on the development of trade among developing countries. Many representatives agreed that article 21 should be expanded or a supplementary article should be formulated to except from the operation of the most-favoured-nation clause any preferences or favours which developing countries granted to one another.<sup>115</sup>

261. In the framework of preferences granted by developing countries to one another, the view was expressed that the necessary additional provision should deal in particular with preferences granted by developing countries to each other as members of a customs union, free-trade area or other similar association, since economic or customs unions as such would not justify the inclusion of such an exception in the draft. Although that exception might not be recognized as implied under customary international law, it ought to be acknowledged in cases where the paramount objective was the economic development of developing countries.<sup>116</sup>

262. In the Sixth Committee, in 1977, it was stressed that, in its second reading of article 21, the Commission should make provision for safeguarding the interests of developing countries according to their degree of development and should codify the differential treatment referred to in the Tokyo Declaration not only with regard to tariffs but also in broader areas of co-operation between industrialized and developing countries.<sup>117</sup>

#### *Written comments*<sup>118</sup>

263. The *Byelorussian SSR* and the *USSR* approve the provisions of article 21.

264. *Luxembourg*. The Government of Luxembourg approves the substance of articles 21, 22 and 23, which are based on the same principle, namely, that the clause may not be used to extend the benefit of advantages accorded by the granting State in a context alien to the normal context of most-favoured-nation treatment, such as development assistance, frontier traffic and special facilities extended to land-locked States.

265. The *German Democratic Republic* supports the provisions of article 21 and feels that the proposal that exceptions should be made for mutual prefer-

ences granted in relations between developing countries deserves special consideration, especially in the light of article 21 of the Charter of Economic Rights and Duties of States.<sup>119</sup>

266. *Sweden*. In the opinion of the Swedish Government, the generalized systems of preferences are of a temporary character. They should no longer be applied when the developing countries have reached a stage of development which allows them to assume more of the obligations resulting from rules of international trade. While accepting the generalized systems of preferences as a temporary measure, the Swedish Government does not consider it desirable to grant to those systems a special legal status by including a specific article on those preferences in the draft articles.

267. *Hungary*, the *Ukrainian SSR* and *Czechoslovakia* consider the exceptions contained in article 21 to be justified.

268. *Guyana*. The Government of Guyana believes that it is right to include article 21 in the draft articles. The article gives recognition to the system of generalized non-reciprocal, non-discriminatory preferences as an instrument for ensuring access by developing countries to the markets of developed countries for their goods.

269. The article secures the position of a developed country vis-à-vis another developed country in the matter of granting preferences.

270. Trading between developing countries is a recent phenomenon; such co-operation among developing countries could no doubt benefit from the inclusion of a provision similar to draft article 21, which would enable developing countries to secure their positions vis-à-vis one another.

271. The *United States of America* feels that article 21 presents a material problem.

272. The effect of article 21 is to except from all future most-favoured-nation clauses generalized preferences granted to developing countries, whether or not such preferences come within an exception or waiver, such as the current waiver from the most-favoured-nation provisions of the General Agreement on Tariffs and Trade.<sup>120</sup> Article 21 would deny to a non-beneficiary of generalized preferences any basis for questioning, on most-favoured-nation grounds, the effect of the extension of preferential direct treatment to a developing third State. The article thus embodies a major departure from existing rules.

273. The GATT waiver, which currently excepts generalized preferences from the most-favoured-nation clause, was drafted deliberately to afford some measure of protection to third States beneficiaries of that clause. It contains a notification and consultation requirement and provides that any contracting party which considers that "any benefit accruing to it under the General Agreement may be or

<sup>114</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 67.

<sup>115</sup> *Ibid.*, para. 68.

<sup>116</sup> *Ibid.*, para. 69.

<sup>117</sup> *Ibid.*, *Thirty-second Session, Annexes*, agenda item 112, document A/32/433, para. 190.

<sup>118</sup> See foot-note 20 above.

<sup>119</sup> General Assembly resolution 3281 (XXIX).

<sup>120</sup> For reference, see foot-note 86 above.

is being impaired ... may bring the matter before the Contracting Parties" for review and recommendation.<sup>121</sup> Article 21 of the Commission's draft does not provide such protection. In the view of the United States, the Commission's draft is deficient in not providing for some such mechanism for determination of the applicability of generalized preferences in a given case.

274. The legal basis for differential and more favourable treatment benefiting developing countries (including trade preferences) is under negotiation in the multilateral trade negotiations. For this reason, and because of the deficiency noted above, the United States at this juncture wishes to reserve its position on article 21, particularly in order to determine whether changes in that article should be made on the basis of the results of the negotiations. At the same time, the United States is open to appropriate possibilities of future agreement on modifications of most-favoured-nation principles for the benefit of developing countries. It notes that article 27 of the Commission's draft has been prepared with such possibilities in view.

275. *Colombia*. The Government of Colombia proposes the insertion of the word "developed" before the words "beneficiary State" at the beginning of the text of the article. By specifying in this way the treatment extended within a generalized system of preferences, it will be possible to prevent the improper application of the clause in the field of economic relations. It should not have the effect of upsetting the balance of international trade and giving certain countries unfair and non-reciprocal advantages.

276. The article could also be supplemented by a provision stating that extension of most-favoured-nation treatment within a generalized system of preferences does not imply discrimination and is not detrimental to other developing countries.

#### *Comments of international organizations*

277. The *GATT secretariat*<sup>122</sup> considers that the Tokyo Declaration, which launched the multilateral trade negotiations in GATT, recognizes the importance of maintaining and improving the GSP and of special and more favourable treatment for developing countries in both the tariff and the non-tariff fields. The responsibility for supervising and guiding these negotiations rests with the Trade Negotiations Committee, which, at present, is composed of representatives of 98 countries. The Committee has established a number of groups and subgroups to deal with the various areas of the negotiations. One of the groups, which has come to be known as Group "Framework", is to consider improvements in the legal framework for the conduct of world trade. One

of the items on the provisional agenda of the group is:

The legal framework for differential and more favourable treatment for developing countries in relation to GATT provisions, in particular, the most-favoured-nation clause.

278. *ECWA*.<sup>123</sup> The Economic Commission for Western Asia considers that it would be advisable to change article 21, either by making it more general (without any specific mention of the generalized system of preferences) or by expanding it to include other forms of preferential treatment for developing countries. In particular, the article neglects to mention preferences which are granted among developing countries (i.e. a beneficiary State is not entitled under a most-favoured-nation clause to any treatment granted by a granting developing State to a developing third State in the context of preferential trade agreements).

279. *EEC*.<sup>124</sup> The Community shares the concern expressed by the Commission concerning the specific interests of developing countries in their relations with industrialized countries. It most commonly grants preferential treatment in agreements based on article 238 of the Treaty of Rome.<sup>125</sup> In such agreements, it does not grant most-favoured-nation status but rather a more favourable arrangement.

280. In order to take into account not only the granting by the industrialized countries of generalized preferences to developing countries, but also the special links resulting from preferential agreements concluded or to be concluded by industrialized States, and in particular the Community, with developing countries, the Community suggests that draft article 21 should be amended to read as follows:

"A beneficiary State is not entitled under a most-favoured-nation clause to any treatment extended by a developed granting State to a developing third State on a non-reciprocal basis under a preferential régime established by that granting State."

#### OPINION OF THE SPECIAL RAPPORTEUR

281. The Special Rapporteur feels that, with the exception of the view that there is no need to retain article 21 in the draft, all other comments refer not to the article itself but to the question of adding to the draft new provisions relating to exceptions in favour of developing countries. The Special Rapporteur suggests, therefore, that it would be advisable to retain article 21 in its present form.

282. In the view of the Special Rapporteur, proposals concerning the addition to the draft of new provisions relating to exceptions to the most-favoured-nation clause in favour of developing countries touch on two questions: (a) the so-called

<sup>121</sup> GATT, *Basic Instruments and Selected Documents*, Eighteenth Supplement (Sales No. GATT/1972-1), p. 26.

<sup>122</sup> See *Yearbook ... 1978*, vol. II (Part Two), p. 178, document A/33/10, annex, sect. C, subsect. 3.

<sup>123</sup> *Ibid.*, p. 175, sect. B.

<sup>124</sup> *Ibid.*, sect. C, subsect. 6.

<sup>125</sup> For reference, see foot-note 36 above.

differentiated treatment established by a developed State in favour of a developing country; (b) preferences and favours which developing countries grant to each other in their mutual relations.

283. It appears to the Special Rapporteur, in the light of the reply of the GATT secretariat,<sup>126</sup> that a draft relating to the legal status of the differentiated system of preferences (similar to the GSP) is being prepared in the framework of GATT and will be established by the developed granting countries in favour of the developing countries. The treatment which will be granted to the developing countries on a non-reciprocal basis under this system is subject to an exception to the operation of the most-favoured-nation clause in the GATT system.

284. If this impression of the Special Rapporteur is correct, he would be in favour of drafting an appropriate article, similar to article 21, for inclusion in the draft. Unfortunately, at the present time, this is hardly possible since the work being carried out within the framework of GATT is far from completed and the draft has not yet taken legal form. However, the Special Rapporteur feels that, when this legal instrument materializes, the existing draft articles could easily be supplemented with the appropriate provisions.

285. The Special Rapporteur is in complete sympathy with the general thesis that developing countries should not extend to developed countries, even under the most-favoured-nation clause, those preferences and favours which they grant each other to promote economic development. The Special Rapporteur sincerely wishes to take full account of the interests of the developing countries. However, it is unfortunately not clear to him what specifically is meant by the expression "preferences which are granted among developing countries", that is to say, what existing or possible system of preferences is involved. The Special Rapporteur will try to explain the main reasons for his doubts.

286. The ECWA communication<sup>127</sup> concerning the "preferences which are granted among developing countries" gave the text of the proposed article. While the Special Rapporteur is extremely grateful to ECWA for its willingness to cast its proposal in a clear legal form, he would like to draw attention to the fact that the proposed draft article reads as follows:

"A beneficiary State is not entitled under a most-favoured-nation clause to any treatment granted by a granting developing State to a developing third State in the context of preferential trade agreements."

287. What is involved in the proposed text? In the view of the Special Rapporteur, the following situations are described. Developing State A has concluded an agreement on trade preferences with developing State B. No beneficiary State, either de-

veloped or developing, may claim those preferences on the basis of the clause. The question arises as to why that should be so. If the above-mentioned "trade agreement" (bilateral or multilateral) in fact establishes a customs union, a free-trade area or, for instance, an integration community of developing countries, then the problem is reduced to the case of customs unions and similar associations of States, which has already been considered in the context of article 15.<sup>128</sup> The problem is in no way simplified by the fact that only economic unions of developing countries are involved.

288. In principle, the text proposed by ECWA could be modified by beginning it with the words "a developed beneficiary State". However, even then, all the doubts mentioned above remain. Furthermore, there is the additional and more complicated problem of establishing the criteria for dividing States into developed and developing for the purposes, in particular, of international trade relations.

289. The Special Rapporteur would like to draw attention to the fact that this problem did not arise in the case of the existing article 21, as a generalized system of preferences is established by a given developed State, which itself determines also the group of developing countries to which the preferences are extended.

290. The Special Rapporteur feels that it is important first to work out some kind of general system of preferences among developing countries and the conditions for its application among those countries, in order to be able to consider and decide the question of the non-extension of such a system to developed countries under the clause. Unfortunately, in the oral and written comments which were available to the Special Rapporteur, nothing is said of such systems.

291. The Special Rapporteur hopes that sufficient light will be thrown on this question during the second reading of the draft articles at the Commission's thirtieth session.

292. The Special Rapporteur fully shares the concern of the United States<sup>129</sup> with regard to the possible deficiencies of article 21 as compared, for instance, to the more advanced provisions of GATT on this subject. He believes, however, that, for contracting parties to GATT, any conditions for the operation of a generalized system of preferences which have been established under GATT or may be established in the future will remain valid notwithstanding the present draft article. At the same time, article 21 would allow granting States which are not parties to GATT to use a generalized system of preferences in their trade relations with developing countries. In other words, article 21 relates to certain interests of the developing countries, and in that sense it is useful.

293. The Special Rapporteur also fully shares the desire of EEC<sup>130</sup> to improve the wording of ar-

<sup>126</sup> See para. 277 above.

<sup>127</sup> See para. 278 above.

<sup>128</sup> *Ibid.*, paras. 200 *et seq.*

<sup>129</sup> *Ibid.*, paras. 271-274.

<sup>130</sup> *Ibid.*, paras. 279-280.

ticle 21, taking into account the specific interests of the developing countries.

294. The proposed draft differs from the original in substituting the phrase "under a preferential régime" for "within a generalized system of preferences", which, naturally, fundamentally alters the nature of the regulation.

295. The Special Rapporteur is not convinced, however, that the proposed change is fully justified. The concept of a "generalized system of preferences" is now fairly clearly established within UNCTAD and GATT and in other cases. It is far from clear, however, what should be understood by the expression "preferential régime" (established by a developed granting State). The Special Rapporteur believes that the latter concept could be used in article 21 only if it were specially defined on the basis of a fairly widespread use of such a procedure by States. However, he feels it would be extremely difficult to give such a definition.

296. With regard to the inclusion in the draft of additional provisions to take into account the interests of developing countries, the Special Rapporteur has already expressed his opinion.<sup>131</sup>

297. With regard to the comments of the Government of Colombia,<sup>132</sup> the Special Rapporteur wishes to state that the provisions of draft article 21 stem from the basic assumption that it is the granting State itself that decides not only which specific preferences it is prepared to extend to developing countries on a non-reciprocal and non-discriminatory basis within the system of preferences it has itself established, but also which developing countries can benefit from such preferences. In any case, no beneficiary State, whether developed or developing, can claim such preferences under the clause.

298. In other words, a generalized system of preferences for the benefit of the developing countries is a *direct system*, which cannot be extended by virtue of this clause. The addition of the word "developed" at the beginning of article 21 would radically change the substance of this article.

299. The Special Rapporteur therefore feels that article 21 should be retained in its present form.

**Article 22. The most-favoured-nation clause in relation to treatment extended to facilitate frontier traffic**

*Comments of States*

*Oral comments*

300. In the Sixth Committee in 1976, many representatives supported the exceptions embodied in article 22, which took account of the special situation

of States having a common frontier and which were based on State practice.<sup>133</sup>

*Written comments*<sup>134</sup>

301. The *Byelorussian SSR*, the *German Democratic Republic*, *Luxembourg* and the *USSR* support article 22.

302. *Hungary* and the *Ukrainian SSR* also agree with the provisions of article 22.

303. *Czechoslovakia* agrees with the substance of articles 22 and 23. However, it doubts the advisability of retaining the limitation in the sense of paragraph 2 of each article.

OPINION OF THE SPECIAL RAPPORTEUR

304. The Special Rapporteur believes that the conditions set out in article 22, paragraph 2, are fully justified, and suggests that the article should be retained in its present form.

**Article 23. The most-favoured-nation clause in relation to rights and facilities extended to a land-locked State**

*Comments of States*

*Oral comments*

305. In the Sixth Committee in 1976, many representatives agreed with the exception provided for in the article regarding special benefits accorded to land-locked countries on account of their geographical situation.<sup>135</sup>

306. It was said that the principle dealt with in the article had been embodied in instruments such as the 1958 Convention on the High Seas<sup>136</sup> and the 1965 Convention on Transit Trade of Land-locked States.<sup>137</sup> It was also said that the article was based to some extent on principle VII adopted by the United Nations Conference on Trade and Development at its first session,<sup>138</sup> and was in line with the special measures for land-locked countries adopted at the Fifth Conference of Heads of State or Government of Non-Aligned Countries (Colombo, 1976) in its resolution 31.<sup>139</sup>

<sup>133</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 71.

<sup>134</sup> See foot-note 20 above.

<sup>135</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, paras. 72-77.

<sup>136</sup> United Nations, *Treaty Series*, vol. 450, p. 11.

<sup>137</sup> *Ibid.*, vol. 597, p. 3.

<sup>138</sup> *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No. 64.II.B.11), p. 25.

<sup>139</sup> See A/31/197, annex IV.

<sup>131</sup> *Ibid.*, paras. 282-291.

<sup>132</sup> *Ibid.*, paras. 275-276.

*Written comments*<sup>140</sup>

307. The *Byelorussian SSR*, the *German Democratic Republic*, *Luxembourg* and the *USSR* approve of article 23.

308. *Hungary* and the *Ukrainian SSR* also agree with the provisions of article 23.

309. *Czechoslovakia* agrees with the substance of article 23, but doubts the advisability of retaining the limitation in the sense of paragraph 2 of the article.

310. It also thinks it would be expedient to take into account in the final wording of article 23 the corresponding outcome of the Third United Nations Conference on the Law of the Sea.

## OPINION OF THE SPECIAL RAPPORTEUR

311. The Special Rapporteur believes that the conditions laid down in article 23, paragraph 2, are fully justified, and suggests that article 23 should be retained in its present form.

312. He also considers that it would be useful to take into account the corresponding outcome of the Third United Nations Conference on the Law of the Sea.

**Article 24. Cases of State succession, State responsibility and outbreak of hostilities***Comments of States**Oral comments*

313. According to the 1976 report of the Sixth Committee, some representatives agreed with the inclusion of draft article 24, which reproduced the text of article 73 of the Vienna Convention, since the draft articles were autonomous. Other representatives expressed doubts as to the need for the article but did not oppose its retention.<sup>141</sup>

## OPINION OF THE SPECIAL RAPPORTEUR

314. The Special Rapporteur suggests that article 24 should be retained in its present form.

**Article 25. Non-retroactivity of the present articles***Comments of States**Oral comments*

315. According to the 1976 report of the Sixth Committee, some representatives approved of the

adoption of article 25. Other representatives questioned the usefulness of the article in view of the general rule in article 28 of the Vienna Convention, but they did not insist on its deletion.<sup>142</sup>

## OPINION OF THE SPECIAL RAPPORTEUR

316. The Special Rapporteur suggests that article 25 should be retained in its present form.

**Article 26. Freedom of the parties to agree to different provisions***Comments of States**Oral comments*

317. According to the 1976 report of the Sixth Committee, many representatives expressed support for article 26, which underlined the residual character of the provisions contained in the draft. It was said that the provisions of article 26 would certainly be of value in interpreting clauses even in the circumstances provided for in the article.<sup>143</sup>

318. The view was expressed that article 26 should be modified to ensure that it was not used as a pretext for discrimination.<sup>144</sup>

## OPINION OF THE SPECIAL RAPPORTEUR

319. The Special Rapporteur suggests that article 26 should be retained in its present form.

**Article 27. The relationship of the present articles to new rules of international law in favour of developing countries***Comments of States**Oral comments*

320. According to the 1976 report of the Sixth Committee, many representatives expressed satisfaction that article 27 had been added to the draft articles.<sup>145</sup>

321. Some representatives considered that it was possible to improve the wording of article 27 and to supplement it by guarantees in favour of developing countries.<sup>146</sup>

322. The opinion was also expressed that article 27 should be amplified by the addition of a second paragraph restating General Principle Eight adopted by

<sup>140</sup> See foot-note 20 above.

<sup>141</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes, agenda item 106, document A/31/370, para. 78.*

<sup>142</sup> *Ibid.*, para. 79.

<sup>143</sup> *Ibid.*, para. 80.

<sup>144</sup> *Ibid.*, para. 81.

<sup>145</sup> *Ibid.*, para. 82.

<sup>146</sup> *Ibid.*, para. 84.

the United Nations Conference on Trade and Development at its first session.<sup>147, 148</sup>

OPINION OF THE SPECIAL RAPPORTEUR

323. The Special Rapporteur considers it advisable to retain article 27 in its present form.

**IV. The problem of the procedure for the settlement of disputes relating to the interpretation and application of a convention based on the draft articles**

324. According to the 1976 report of the Sixth Committee, some representatives considered that the draft should contain an article on the settlement of disputes. In support of this position, it was said that, in the absence of legal precedents, the implementation and interpretation of a future convention creating new rights and duties would inevitably give rise to disputes. A State should not be the sole interpreter of the rules concerning the most-favoured-nation clause; without a uniform interpretation and the establishment of settlement procedures, the application of the rules might lead to the disintegration of carefully negotiated compromises designed to give balanced protection to competing rights and interests.<sup>149</sup>

325. The view was also expressed that arrangements with regard to the settlement of disputes could concern only disputes arising from the application of the future convention and not disputes which might arise between parties to an agreement containing the most-favoured-nation clause.<sup>150</sup>

326. Other representatives agreed with the Commission that it was not useful, at the present stage, to include a provision on the settlement of disputes and with its decision to refer the question to the General Assembly and Member States and eventually, to the body entrusted with the task of finalizing the draft articles.<sup>151</sup>

<sup>147</sup> *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No. 64.II.B.11), p. 20.

<sup>148</sup> *Official Records of the General Assembly, Thirty-first Session, Annexes*, agenda item 106, document A/31/370, para. 84.

<sup>149</sup> *Ibid.*, para. 29.

<sup>150</sup> *Ibid.*, para. 30.

<sup>151</sup> *Ibid.*, para. 31.

*Written comments*<sup>152</sup>

327. The *German Democratic Republic* considers that the Commission should not formulate an article on the settlement of disputes. Most-favoured-nation clauses appear in specific treaties. They are an integral part of those treaties. Problems arising from the interpretation of such most-favoured-nation clauses should therefore be regulated under the procedures laid down in the treaties in question for the settlement of disputes.

328. *Luxembourg*. The Government of Luxembourg considers that the sole purpose of the provisions of the draft is the establishment of *rules of interpretation* or presumptions, intended to establish the meaning of the most-favoured-nation clause in default of stipulations to the contrary.

OPINION OF THE SPECIAL RAPPORTEUR

329. The Special Rapporteur would first of all like to point out that the matter is being considered in connexion with a possible future convention based on the Commission's draft articles.

330. Such a convention would, however, have a somewhat secondary character. It would set down, as the Government of Luxembourg has rightly pointed out, the rules for interpreting clauses or that which should be presumed in the interpretation and application of clauses if they themselves do not contain other rules.

331. In other words, the convention cannot be applied except in connexion with specific clauses. It can serve (a) as a source of information on the substance and legal consequences of clauses for bodies engaged in negotiations on the conclusion of clauses or which are called upon to apply them, and (b) as an auxiliary instrument for the settlement of disputes on the interpretation or application of a specific clause, if the parties to the dispute are parties to the convention or have agreed in some other way to apply it. The existence of a dispute with regard to the convention itself would signify a twofold dispute and would clearly lead to an impasse.

332. The Special Rapporteur suggests, therefore, that it is hardly advisable to provide for a procedure for the settlement of disputes relating to the interpretation and application of a possible future convention.

<sup>152</sup> See foot-note 20 above.



# STATE RESPONSIBILITY

(Agenda item 2)

DOCUMENT A/CN.4/307 and Add.1 and 2\*

Seventh report on State responsibility, by Mr. Roberto Ago, Special Rapporteur

*The internationally wrongful act of the State, source of international responsibility (continued\*\*)*

[Original: French]  
[29 March, 17 April and 4 July 1978]

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## ABBREVIATIONS

GATT	General Agreement on Tariffs and Trade
I.C.J.	International Court of Justice
<i>I.C.J. Pleadings</i>	<i>I.C.J. Pleadings, Oral Arguments, Documents</i>
<i>I.C.J. Reports</i>	<i>I.C.J. Reports of Judgments, Advisory Opinions and Orders</i>
ILO	International Labour Organisation
P.C.I.J.	Permanent Court of International Justice
<i>P.C.I.J., Series A</i>	<i>P.C.I.J., Collection of Judgments</i>
<i>P.C.I.J., Series A/B</i>	<i>P.C.I.J., Judgments, Orders and Advisory Opinions</i>
<i>P.C.I.J., Series C</i>	<i>P.C.I.J., Pleadings, Oral Statements and Documents</i>

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\* Incorporating document A/CN.4/307/Add.2/Corr.1.

\*\* The present report is a continuation of the sixth report on State responsibility, submitted by the Special Rapporteur to the Commission at its twenty-ninth session (*Yearbook ... 1977*, vol. II (Part One), p. 3, document A/CN.4/302 and Add.1-3).

## EXPLANATORY NOTE: ITALICS IN QUOTATIONS

An asterisk inserted in a quotation indicates that, in the passage immediately preceding the asterisk, the italics have been supplied by the Special Rapporteur.

## CHAPTER III

*Breach of an international obligation (continued<sup>1</sup>)*

## 8. BREACH OF AN OBLIGATION TO PREVENT AN EVENT

1. In order to complete the study of the possible effect of the distinctive characteristics of the various kinds of international obligations on the determination of the conditions of their breach, one last aspect must be taken into consideration. In the multi-form framework of the obligations placed on States by general international law or treaties, it is easy to distinguish a well-characterized category, namely, that of obligations whose specific object is to prevent the occurrence of certain events which might unduly harm foreign States or their representatives and nationals. It is then a question of deciding what conditions must be present for there to be a breach of an obligation in this category.

2. In order to answer the question thus raised, it is necessary to bear in mind the terms of the hypothesis to which we are referring. The event in question may, in certain cases, have its direct and natural cause in an action of State organs. That is the case, for example, with regard to the destruction of a hospital or a protected cultural asset, due to a lack of precaution during the bombardment of other objectives in enemy territory. The cases most often referred to are, however, those where the natural cause of the event is not a State action but the event is nevertheless caused by the failure of State organs to prevent it. An attack by private persons on a foreign embassy or consulate, the massacre of foreigners by a hostile mob, and so on, are classic examples of this. It goes without saying that the preventive action required of the State consists essentially of surveillance and vigilance with a view to preventing this event, in so far as it is materially possible.

3. It thus seems clear that, in order to be able to establish the breach of an obligation in this category, two conditions are required: the event to be prevented must have occurred, and it must have been made possible by a lack of vigilance on the part of State organs. Clearly, a State cannot be alleged to have breached its obligation to prevent a given event so long as the event has not actually occurred, and the same is true where the feared event has occurred

but cannot be ascribed to a lack of foresight on the part of certain State organs. In other words, neither the occurrence of the event without there having been any negligence on the part of State organs nor such negligence without the occurrence of any event in itself constitutes a breach of the international obligation. Only the combination of these two elements permits the conclusion that there has been such a breach.

4. The hypothesis which we are now considering specifically has already been mentioned in the second<sup>2</sup> and third<sup>3</sup> reports of the Special Rapporteur on State responsibility. It was also considered by the Commission itself at its twenty-second<sup>4</sup> and twenty-fifth sessions.<sup>5</sup> The opportunity arose during the definition of the constituent elements of an internationally wrongful act in general. After having established that (a) conduct attributable to the State under international law and (b) the breach by that conduct of an international obligation incumbent on the State are the two essential constituent elements of an internationally wrongful act, the Commission considered whether a third distinct constituent element should not sometimes be added to the two others, namely, the occurrence, as a result of the State's conduct, of an injurious event or, more simply, "damage". In that connexion, the Commission emphasized the difference between two different types of situation. It did not fail to point out that, in certain cases,<sup>6</sup> "the conduct as such is itself sufficient to constitute a breach of an international obligation incumbent upon the State". However, the Commission added that in other cases "the situation is different". To give an example, it recalled that:

For a State to be said to have failed in its duty to protect the premises of a foreign embassy against injurious acts of third parties, it is not sufficient to show that the State was negligent in not providing adequate police protection; some injurious event must have also taken place as a result of that negligence, such as damage by hostile demonstrators or an attack on the embassy premises by private individuals.

<sup>2</sup> *Yearbook ... 1970*, vol. II, p. 194, document A/CN.4/233, paras. 50-52.

<sup>3</sup> *Yearbook ... 1971*, vol. II (Part One), pp. 222-223, document A/CN.4/246 and Add.1-3, paras. 70-72.

<sup>4</sup> *Yearbook ... 1970*, vol. II, p. 308, document A/8010/Rev.1, para. 80.

<sup>5</sup> *Yearbook ... 1973*, vol. II, pp. 182-183, document A/9010/Rev. 1, chap. II, sect B, draft articles on State responsibility, article 3, para. (11) of the commentary.

<sup>6</sup> "... for example, failure by the State's legislative organs to pass a law which the State, by treaty, has specifically undertaken to enact, or refusal by a coastal State to permit innocent passage through its territorial waters in peacetime to ships of another State ..." (*Ibid.*)

<sup>1</sup> For the beginning of chapter III (sections 1-7), see *Yearbook ... 1976*, vol. II (Part One), p. 3, document A/CN.4/291 and Add.1-2, and *Yearbook ... 1977*, vol. II (Part One), p. 3, document A/CN.4/302 and Add.1-3.

In a case of that kind, and, the Commission added: "in general in cases where the purpose of the international obligation is precisely to prevent the occurrence of certain injurious events":

Negligent conduct of the organs of the State does not become an actual breach of the international obligation unless the conduct itself is combined with a supplementary element, an *external event*,\* one of those events which the State should specifically have endeavoured to prevent.

The Commission then sought to eliminate any possible ambiguity regarding the relationship of such an event to the constituent elements of an internationally wrongful act by emphasizing that:

Even if, in some cases, it has to be concluded that there is no internationally wrongful act so long as a particular external event has not occurred, that does not imply that the two conditions for the existence of an internationally wrongful act—conduct attributable to the State and breach by that conduct of an international obligation—are no longer sufficient by themselves. If there is no internationally wrongful act so long as the event has not occurred, the reason is that until then the State's conduct has not resulted in the breach of an international obligation. It is really the objective element of the internationally wrongful act that is missing. In other words, *the occurrence of an external event is a condition for the breach of an international obligation*,\* and not a new element which has to be combined with the breach for there to be a wrongful act.<sup>7</sup>

The Commission then decided therefore to deal with the question as we are now doing—within the framework of problems relating to the objective element of the internationally wrongful act.

5. The Special Rapporteur and the Commission reverted to the question when examining more particularly the possibility of considering the conduct of private persons as an act of the State. On that occasion, the Commission stated that, if it was true—and it subsequently verified that such a conclusion was justified—that injurious conduct on the part of private persons is not as such attributable to that State, it must be concluded that such conduct constitutes only an *event external* to the act of the State.

This does not mean that such an event would not affect the determination of the State's responsibility. On the contrary, ... it could be a condition for the existence of such responsibility by acting from outside as a catalyst for the wrongfulness of the conduct of the State organs in the case under consideration. For example, if the international obligation of the State consists of seeing to it that foreign States or their nationals are not attacked by private persons, a breach of that obligation occurs only if an attack is actually committed. But it would not, in any case, constitute a condition for attributing to the State the conduct of its organs; there would be no doubt about such attribution even without the external event. What would depend on the external event in question would be the possibility of considering the act of the

State, in the case in point, as constituting a completed breach of an international obligation, and hence as being a source of international responsibility.<sup>8</sup>

6. Having reviewed these precedents regarding the positions already indirectly adopted by the Commission, the views expressed by Governments on this subject will now be considered.

7. None of the points in the request for information addressed to States by the Preparatory Committee of the Conference for the Codification of International Law, held at The Hague in 1930, asked Governments directly and explicitly to state whether, in their opinion, international responsibility could be placed on the State for the breach of an obligation to prevent a given event, so long as that event had not occurred. Nevertheless, the Committee did not ignore the question. On the contrary, it had itself replied to the question by the way in which it had presented the so-called problem of State responsibility for "damage" caused by private persons. As we have pointed out, injurious action by private persons is something different from and alien to the conduct of State organs; to be precise, it is an external event which could occur because preventive action by the State apparatus was lacking. The request for information took it for granted that the event represented by the act committed by private persons to the detriment of foreigners must have actually occurred in order for the responsibility of the State for lack of prevention on the part of its organs to be involved. Point VII (a) of the request for information was worded as follows:

Circumstances in which the acts of private persons causing damage to the person or property of a foreigner in the territory of a State may be the occasion of liability on the part of the State, and grounds on which such liability arises, if it does arise:

(a) Failure on the part of the State authorities to do what is in their power to preserve order and prevent crime, or to confer reasonable protection on the person or property of a foreigner.<sup>9</sup>

By this statement, the Committee demonstrated its conviction that any failure to provide "reasonable" prevention on the part of the State organs entrusted with that task could not be taken into consideration as a source of international responsibility except "on the occasion" of acts by a private person committed to the detriment of a foreigner. The existence of a breach by the State of its international obligation would therefore depend on the presence of two conditions: lack of prevention on the part of State organs, and the occurrence, within this framework, of the event constituted by the injurious act of the private person. A review of the replies sent in by

<sup>7</sup> *Ibid.* In the same connexion, see G. Morelli, *Nozioni di diritto internazionale*, 7th ed. (Padua, CEDAM, 1967), p. 349:

"... anche in questi casi il fatto illecito è costituito soltanto dalla condotta del soggetto; l'evento non è un elemento del fatto illecito, ma è semplicemente una circostanza che permette di considerare la condotta tenuta in concreto del soggetto come rientrante nel novero di quelle che sono vietate dalla norma."

"... in these cases too, the wrongful act consists solely of the conduct of the subject; the event is not an element of the wrongful act, but simply a circumstance which makes it possible to consider the actual conduct of the subject as one of the types of conduct prohibited by the rule."]

<sup>8</sup> *Yearbook ... 1975*, vol. II, p. 72, document A/10010/Rev.1, foot-note 100. See also *ibid.*, p. 54, document A/10010/Rev.1, chap. II, sect. B, article 11, para. 33 of the commentary. The Special Rapporteur dealt with the same question in his fourth report (*Yearbook ... 1972*, vol. II, p. 97, document A/CN.4/264 and Add. 1, para. 65; *ibid.*, p. 123, para. 141; and p. 126, para. 145).

<sup>9</sup> League of Nations, *Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III, *Responsibility of States for Damage Caused in their Territory to the Person or Property of Foreigners* (C.75/M.69.1929.V), p. 93.

Governments does not reveal the slightest reservation concerning the opinion on the basis of which the Committee drew its conclusions.<sup>10</sup> The same is true of the replies to point IX of the request for information, which extended the question put in point VII to the hypothetical case of damage caused to foreigners by "persons engaged in insurrections or riots, or through mob violence".<sup>11</sup>

8. In the two hypothetical cases considered under points VII and IX, the authors of the request for information raised the question of the possibility of attributing to a State the breach of its preventive obligations only in relation to the case where occasion for it had arisen as a result of the occurrence of an injurious event which the State organs had neglected to prevent. However, there is another point in which the request did not expressly mention such an "occasion". Point V, No. 1 (c) was worded as follows:

Does the State become responsible in the following circumstances, and, if so, on what grounds does liability rest:

...

(c) Failure to exercise due diligence to protect individuals, more particularly those in respect of whom a special obligation of protection is recognised—for example: persons invested with a public character recognised by the State?<sup>12</sup>

There was thus no mention here of "acts of a private person" constituting the condition for the existence of international responsibility in the event of lack of prevention on the part of State organs. Consequently, the adoption of an explicit position, in its reply, by a Government which had actually studied the matter in depth is all the more interesting. The Austrian Government comments that:

It is obvious that mere failure to exercise due diligence in protecting the person of foreigners does not in itself involve the responsibility of the State: such responsibility would arise only if a foreigner suffered injury through the act of a private person.<sup>13</sup>

The Austrian Government thus stresses that the conclusion relating to the case envisaged under the point in question should be equated, under that aspect, with the conclusion valid for the case mentioned under point VII. The replies of other Governments, while not as precise as the Austrian reply, must have been interpreted to the same effect by the Drafting Committee, because, in drafting basis of discussion No. 10, the latter stated:

A State is responsible for *damage suffered*\* by a foreigner as the result of failure on the part of the executive power to show such diligence in the protection of foreigners as, having regard to the circumstances and to the status of the persons concerned, could be expected from a civilised State ...<sup>14</sup>

In other words, the existence of the event, represented by the damage actually caused to a foreigner

having a public character, is expressly indicated, at the same time as the lack of diligence in prevention, as one of the two conditions required in order for the State's breach of its obligation to be established and its responsibility entailed.

9. At the Conference, basis No. 10 formulated by the Drafting Committee was incorporated in new basis No. 10, providing that a State was responsible "for damage caused by a private person to the person or property of a foreigner".<sup>15</sup> The Conference did not have an opportunity to make a definitive pronouncement on the point in question, but it seems beyond doubt that the view generally shared by all the Governments represented was that a State could not be held responsible for the breach of the obligation to prevent an event such as an injurious act by a private person affecting a foreigner, so long as that event had not occurred.

10. The attitude adopted by States in connexion with disputes to which they were parties must now be considered. In judicial precedents and in international practice, cases where the subject of a dispute has been the breach of an international obligation requiring a State to see that certain events do not occur have, as might be expected, been very numerous. Consideration of these cases shows that, where a Government has complained of the breach of an obligation of this specific kind, it has cited an event which actually occurred. The two conditions necessary for the existence of a breach were thus fulfilled. In other words, a State has never asserted that such a breach has been perpetrated on the sole ground of negligence or failure to prevent a purely hypothetical event which did not actually occur.

11. Disputes whose settlement has been entrusted to an international judicial or arbitral tribunal may first be considered. Consideration of these disputes shows that such a tribunal has never been requested to recognize as a breach of an international obligation the mere fact of the non-adoption by the State of measures to prevent a theoretically possible event which did not actually occur. It has always been in the case of events which actually occurred, and in particular in the case of injurious actions by private persons, insurrectional movements, and so forth, that an international tribunal has been asked to conclude that a State has breached its obligation to prevent such an event. To our knowledge, decisions of international tribunals have never affirmed, even indirectly or incidentally,<sup>16</sup> that failure to adopt measures to prevent the occurrence of a possible event sufficed in itself—i.e., without the actual occurrence of such an event—to constitute a breach of the obligation incumbent on the State.

12. It might, of course, be objected that the fact that international judicial or arbitral tribunals have never

<sup>10</sup> *Ibid.*, and League of Nations, *Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, Supplement to volume III (C.75(a).M.69(a).1929.V)*, pp. 3 and 20.

<sup>11</sup> League of Nations, *Bases of Discussion ... (op. cit.)*, pp. 108 *et seq.*

<sup>12</sup> *Ibid.*, p. 62.

<sup>13</sup> *Ibid.*, p. 63.

<sup>14</sup> *Ibid.*, p. 67.

<sup>15</sup> League of Nations, *Acts of the Conference for the Codification of International Law (The Hague, 13 March–12 April 1930)*, vol. IV, *Minutes of the Third Committee (C.351(c).M.145(c).1930.V)*, p. 143.

<sup>16</sup> They could have done so, for example, when determining the time and duration of the internationally wrongful act.

had occasion to recognize that a State has breached the international obligation to prevent a given event in cases where the event to be prevented did not take place might be due to reasons which, in part at least, deprive it of probative value for our purposes. It might be said that it is difficult to see what interest a State would have in having recourse to a tribunal of this kind in order to establish the existence of a breach which in itself had no serious practical consequences. It might also be said that the use of such a procedure, by reason of its serious nature and lengthiness, hardly seems a suitable means for achieving the rectification—which should be swift in order to be effective—of a situation considered dangerous and where recourse to diplomatic procedure would seem more normal. It must, however, be recognized that the adoption of positions by Governments in the case of disputes settled through the diplomatic channel are the same as those adopted in the case of disputes submitted to judgment or international arbitration.

13. In diplomatic practice, it is only after the occurrence of an event that States have invoked the breach of the obligation to prevent that event. Let us take one of the best-known obligations in the category considered in this section, namely, the obligation to ensure that the premises of a foreign diplomatic mission are not attacked by private persons, insurgents, organs of foreign States and so forth. There is a whole series of cases in which a State has complained of the fact that the authorities of the host State did not take the necessary measures to protect the premises of its mission and in which the complainant State has alleged the existence of an internationally wrongful act giving rise to international responsibility. However, at both the diplomatic level and the arbitral or judicial level, the complaint was made<sup>17</sup> only after the attack by private persons or others had occurred and on the basis of that attack.<sup>18</sup>

<sup>17</sup> This does not mean that a State could not, in anticipation, have sent a communication to the State to which its mission was accredited, for example, to draw its attention to the fact that the number of police assigned to protect the mission seemed insufficient to ensure its safety. A communication of this type does not constitute a complaint concerning an internationally wrongful act and does not allege international responsibility on the part of the State to which it is addressed.

<sup>18</sup> See, for example, the attitude adopted by the State which considered itself injured in the cases of the *Romanian Legation at Berne* (1955), the *Hungarian Legation at Berne* (1958), the *United States Embassy in Moscow* (1964 and 1965) and the *USSR Embassy at Peking* (1966), all of which are cited in the fourth report on State responsibility (*Yearbook ... 1972*, vol. II, pp. 118 *et seq.*, document A/CN.4/264 and Add.1., paras 130–133).

See also the cases of the United States Embassy in T'ai-pei (1957) (M. Whiteman, *Digest of International Law* (Washington D.C., U.S. Government Printing Office, 1967), vol. VIII, pp. 747 *et seq.*); the Belgian Embassy in Cairo (1961) (*Revue générale de droit international public* (Paris) 3rd Series, vol. XXXII, N° 3 (July–Sept. 1961), pp. 579 *et seq.* and *Revue belge de droit international* (Brussels, 1966), vol. II, No. 2, pp. 505 *et seq.*); the Yugoslav Trade Mission at Bad Godesberg (1962) (*Revue générale de droit international public* (Paris), 3rd series, vol. XXXIV, No. 2 (April–June 1963) pp. 361 *et seq.*, and *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Stuttgart), vol. 24, No. 4 (October 1964), pp. 681 *et seq.*); and of the USSR Embassy in Washington (1968),

The same is true, moreover, with regard to the attitude of injured States in cases of a breach of the duty to protect the person of a diplomatic agent or other organs of a foreign State from any attack,<sup>19</sup> and also in other cases involving the breach of the obligation to prevent a given event.

14. The conclusion which, in our opinion, derives quite obviously from the very nature and purpose of certain international obligations is thus fully confirmed in State practice. It is the clear conviction of Governments that, where international law places an obligation on a State to prevent a certain type of event, observance of that obligation can be called in question and the responsibility of the State affirmed only if one of the events which it was the purpose of international law to prevent actually occurs and if a lack of vigilance and prevention on the part of the State under the obligation has also been proved. It is further necessary that, between the conduct of the State in the case in question and the event which has occurred, there should be a link such that the conduct in question may be regarded as one of the *sine qua non* elements of the event. In other words, it must be possible to establish the existence of a certain relationship of causality, at least indirect, between the conduct of State organs and the event; the conduct must have made possible the occurrence of an event which *otherwise* would not have occurred. If, for example, an attack by private persons on an embassy occurred in circumstances which make it possible to establish that it would certainly have succeeded and achieved its ends even if the State could not be accused of any negligence, the necessary link between the actual conduct of the State and the event would be lacking. That State could not be accused of not having acted to prevent an event which would have occurred in any case, whatever the conduct of the State organs.

15. A further point should also be made. The prevention of a certain event is, in the hypothetical cases referred to in this section, the “direct” object of the international obligation. The aim of the obligation is to ensure that, to the extent possible, the State under the obligation prevents the occurrence of the event in question. These obligations should therefore not be confused with others whose “direct” object is the execution as such of a specific State action and which are consequently breached by the mere fact of the non-execution of that action, independently of the indirect effect that such an action might have had with regard to the prevention of the occurrence of certain events. Two instances will serve to illustrate more clearly the difference between the two hypotheses which come to mind. The obligation to see

(*Revue générale de droit international public* (Paris), 3rd series, vol. XXXIX, No. 4 (Oct.–Dec. 1968), pp. 1082 *et seq.*).

<sup>19</sup> The fourth report of the Special Rapporteur gives details concerning the cases of the murder of the Italian members of the Tellini mission (1923), the murder of the Soviet envoy to the Conference, Worowski (1923), and the murder of the member of the Belgian diplomatic mission in Spain, de Borchgrave (1936), and so forth (see *Yearbook ... 1972*, vol. II, pp. 114 *et seq.*, document A/CN.4/264 and Add. 1., paras. 115 *et seq.*).

that the mission of a foreign State or the person of its representatives are not the victims of attacks by private persons or others is the typical case of an obligation to prevent the occurrence of an event. As has been seen, the breach occurs if the State's failure to take preventive action is accompanied by the occurrence of the event which the State had an obligation to prevent and if, as stated, it occurs specifically because of such lack of prevention. Consider, on the other hand, an obligation such as that requiring the State not to tolerate in its territory the organization and training of organizations aiming at subversion in a neighbouring State. Here the direct object of the obligation is not to prevent the occurrence of an attack on or other event injurious to the Government from occurring in the territory of that State. The obligation requires, within the framework of mutual respect between independent sovereign entities, that the State should not allow an organization hostile to a foreign Government to be established within its own frontiers and to engage there in action aimed at overthrowing the latter Government by violence. Although, after the forcible dissolution of an organization of this kind, the attack which the latter might have been able to perpetrate in foreign territory might not occur, that would be only an indirect effect of the execution of the obligation, the direct object of which is, as has just been said, something quite different. It is thus clear that, in this case, there is a breach of the obligation, solely by reason of the fact that the authorities tolerated the establishment of the organization in question in the territory of the State and did not dissolve it as soon as they knew of its existence and its aims. It is thus possible to conclude that this breach exists and to bring out its consequences without depending, as a subsequent condition, on the fact of the subversive organization's having succeeded in carrying out attacks in foreign territory, provoking subversion there and so forth. It is thus clear that it is only in the first of the two hypothetical cases referred to successively that the occurrence of an external event is a condition for recognizing, in the conduct of the State which made it possible, the breach of an international obligation.

16. In internal law, the authors of learned works in a number of countries have given full treatment to the subject of "the offence of allowing an event to occur" (*délit d'événement*) or "the wrongful act of allowing an event to occur" (*fait illicite d'événement*). That has not been the case in international law. It may nevertheless be noted that writers who have been specially aware of the importance of the question also in the field of international legal relations have agreed in recognizing that it would be inadmissible to conclude that there has been a breach of an international obligation requiring a State to take action to prevent the occurrence of certain events as long as the latter have not taken place.<sup>20</sup> Moreover, it

<sup>20</sup> See, for example, R. Ago, "Le délit international", *Recueil des cours de l'Académie de droit international de La Haye, 1939-II* (Paris, Sirey, 1947), vol. 68, pp. 447 et seq.; G. Morelli, *op. cit.*, pp. 348 et seq.; P. A. Zannas, *La responsabilité internationale des Etats*

should be borne in mind that, when international jurists wish to give a typical example of an international obligation requiring preventive action on the part of the State, they have always referred to the obligation to prevent injurious conduct on the part of private persons. In so doing, the various writers have generally taken as a starting-point the premise of the existence as a *fait accompli* of damage caused by private persons to a foreign State, its representatives or its nationals. It is in relation to damage actually caused that they pose the question of the cases in which the State could be held responsible. As has been seen,<sup>21</sup> the reply of the overwhelming majority of modern writers is that the State cannot be held responsible except in cases where it has omitted to adopt measures normally likely to prevent private persons from committing injurious acts and where such acts were committed because of that omission. However, those writers who have given particular attention to the question have shown that the act of the private person is the *occasion*,<sup>22</sup> or even the *condition*,<sup>23</sup> on the basis of which the State is deemed to have breached its obligation of prevention and incurred the resultant responsibility. This presentation of the situation is clear proof that, in the view of those writers, it is not a theoretically established failure of prevention which constitutes the State's breach of its obligation in the hypothetical cases envisaged, but the failure of prevention *made concrete* by the actual occurrence of an event which more active vigilance could have prevented and which has been made possible by the lack of it. It is thus certain that the literature of international law upholds the point of view put forward in these pages.

17. On the other hand, no useful elements on the question dealt with in this section can be found in codification drafts on State responsibility. That is because these drafts confine themselves to affirming the existence of an internationally wrongful act and State responsibility where there is a breach of an international obligation by the State, without seeking to determine the conditions for the occurrence of such a breach in the various hypothetical cases.

18. However, in the view of the Special Rapporteur, a definition of the conditions for recognition of the breach of an obligation to prevent a given event cannot be omitted from a draft such as that currently being prepared by the Commission. The special at-

*pour les actes de négligence* (Montreux, Ganguin et Laubscher), 1952, pp. 32 et seq.

<sup>21</sup> *Yearbook ... 1975*, vol. II, pp. 80-81, document A/10010/Rev.1, chap. II, sect. B, article 11, para. (33) of the commentary.

<sup>22</sup> See, for example, C. de Visscher, "La responsabilité des Etats" *Bibliotheca Visseriana* (Leiden, Brill, 1924), vol. II, p. 103; A. Decencière-Ferrandière, *La responsabilité internationale des Etats à raison des dommages subis par des étrangers* (Paris, Rousseau, 1925), p. 63; L. Delbez, "La responsabilité internationale pour crimes commis sur le territoire d'un Etat et dirigés contre la sûreté d'un Etat étranger", *Revue générale de droit international public* (Paris), 3rd series, vol. IV (1930), p. 470.

<sup>23</sup> J. Spiropoulos, *Traité théorique et pratique du droit international public* (Paris, Librairie générale de droit et jurisprudence, 1933), p. 275.

tention devoted hitherto to the establishment, with regard to each kind of international obligation, of the conditions in which their breach occurs, would not permit such an omission. It is, moreover, clear that the definition of the conditions for the occurrence of the breach of an obligation of the type considered in this section may in practice have decisive consequences for the determination, in such cases, of the *tempus commissi delicti*.

19. In the light of the foregoing, the Special Rapporteur proposes the following text for adoption by the Commission:

**Article 23. Breach of an international obligation to prevent a given event**

**There is no breach by a State of an international obligation requiring it to prevent a given event unless, following a lack of prevention on the part of the State, the event in question occurs.**

9. TIME OF THE BREACH OF AN INTERNATIONAL OBLIGATION

20. In its consideration of the questions arising in connexion with the objective element of an internationally wrongful act, the Commission first of all sought to determine the meaning of the expression "breach of an international obligation", as used in article 3 (b) of the draft articles approved by the Commission in first reading.<sup>24</sup> In draft article 16, the Commission therefore defined the basic rule requiring that, in general, in order for a breach of an international obligation to exist, there must be an "act of the State" not in conformity with what is required of it by that obligation. In article 17, the Commission subsequently determined more specifically whether the distinctions to be made between international obligations by reason of their origin do or do not have a bearing on the occurrence of a breach of those obligations and on the responsibility arising therefrom. In article 18, it defined, in relation to the various hypothetical cases which might arise, the meaning and scope of the requirement that the obligation be in force for the State in order for there to be a breach of the obligation in question by that State. Fourthly, the Commission considered the question of the possible bearing of the subject-matter of the obligation breached, and of its more or less essential character for the protection of fundamental interests of the international community, on the characterization of the breach in question and, consequently, on the régime of international responsibility applicable to it. The answer to that question was embodied in article 19. The Commission next sought to define the special conditions which must be met in order for there to be a breach of an international obligation according to the various types of obligation and, in particular, according to whether the obligation requires the State

to adopt a particular course of conduct (art. 20), or the achievement of a specified result (art. 21) and specifically a result concerning the treatment to be accorded to aliens (art. 22). In the same context, in the present report, the Special Rapporteur has sought to establish, in draft article 23,<sup>25</sup> how the breach by a State of an obligation requiring it to prevent a given event can be recognized as having occurred. In order to complete chapter III, it is now necessary to determine, in relation to the various types of international obligation mentioned, the respective "time", of their breach; in particular, it is necessary to determine whether and when the "time" in question is instantaneous or extends over a more or less lengthy period. In other words, we are dealing here with the so-called question of the *tempus commissi delicti*.

21. At first glance, it might seem that the determination of the time of the breach of an international obligation involves no special difficulties and above all that it is a question of verifying facts rather than of applying legal criteria. In fact, however, this determination is easy only in the case of an act of the State not in conformity with what is required of it by an international obligation which begins and ceases to exist at the same moment, that is, in the case of an internationally wrongful act which may be described as an "instantaneous" act.<sup>26</sup> However, the task becomes more complicated and necessarily requires the application of legal rules in the relatively simple case where the conduct adopted by the State which is not in conformity with its international obligation extends over a period of time and assumes, in the terms used in article 18, paragraph 3, a "continuing character". The problem then is to determine whether the *tempus* of an internationally wrongful act of this kind should be defined as the time when that act begins, or the whole period during which it continues to exist. Equally dependent on the application of legal criteria is the task of determining the *tempus commissi delicti* in the case, examined specifically in the preceding section, where, in order for the breach of an international obligation to exist, an external event must occur in addition to negligent conduct on the part of State organs. Indeed, in such cases the choice between the period during which the negligent conduct was adopted and the time at which the event rendered possible by that conduct occurred can only be made in the light of legal principles. Lastly, the determination of the time of the occurrence of the internationally wrongful act will be even more difficult, more important and more clearly linked to the application of rules of law in the various cases where the act in question results from the combined

<sup>25</sup> See para. 19 above.

<sup>26</sup> This does not prevent questions from arising and recourse to legal criteria from becoming necessary when a considerable period separates the time when the act of State organs is committed and the time when the effects according to which it is characterized are produced: for example, when the death of a foreign representative as a result of blows inflicted by members of the local police force, or the collapse of a protected building hit by a bomb dropped by an enemy aircraft, occurs some time after the act which caused it.

<sup>24</sup> For the text of all the draft articles adopted so far by the Commission, see *Yearbook ... 1977*, vol. II (Part Two), pp. 9 *et seq.*, document A/32/10, chap. II, sect. B, subsect. 1.



effect of several actions or omissions on the part of State organs. It should be recalled in this connexion that, in the context of article 18, paragraph 4, mention was made of a "composite" act, that is, a case in which the breach occurred as a result of the combined effect of a series of individual acts, of the repetition by State organs of the same conduct in a plurality of separate cases. There is also the case of the internationally wrongful act termed "complex" in article 18, paragraph 5, where the breach occurs as the result of a succession of acts by different organs in the same single specific situation. In both cases, the problem arises, at the legal level, of determining to which State actions constitutive value should be attributed as regards the internationally wrongful act, for it is on this basis that it will be possible to establish when that act begins and ends.

22. The determination of the time of the breach of an international obligation, and hence of an internationally wrongful act, is of practical importance for various reasons. First, it inevitably has a bearing on another question, which will be dealt with more specifically in the second part of the draft articles, namely, that of determining the extent of the responsibility which international law attaches to an internationally wrongful act and, more particularly, that of determining the amount of reparation payable by the State which committed that act. If, for example, in the case of a "continuing" internationally wrongful act, the time of the breach corresponds not only to the initial moment but to the entire period comprised between the beginning and the end of the conduct which is contrary to an international obligation of the State, it would be logically undeniable that the reparation covers all the injuries caused by the conduct in question during the whole of that period.<sup>27</sup> Similarly, in the case of a "composite" wrongful act, the amount of reparation will vary according to whether the breach is considered as having been committed only at the time of the conduct which, combined with a series of earlier acts, makes it possible, let us say, to attribute to that State an internationally wrongful "practice" as such, or rather as having been committed during the entire period between the first act in the series and the last which rendered the existence of the breach apparent. Likewise, in the case of a "complex" wrongful act, the amount of reparation due will probably differ according to whether the breach is regarded as having been committed only at the time of the conduct which completes the breach, or at the beginning of the "complex" process of that breach or, rather, during the whole of the period starting with the first act which failed to achieve the result required by the international obligation to the last act which made that result definitively unachievable.<sup>28</sup>

<sup>27</sup> See, in this connexion, R. Ago, *loc. cit.*, p. 521.

<sup>28</sup> *Ibid.*, pp. 517 *et seq.* According to P. Reuter ("La responsabilité internationale", *Droit international public* (course), Paris, Les Nouvelles Institutes, 1955-1956, p. 98), in the case of what we have called a "complex" wrongful act, obligation to make reparation for the damage caused from the time of the first act should be admitted, even if it is argued that the breach of the obligation con-

23. The determination of the time of the breach of an international obligation may also have a bearing on the determination of the jurisdiction of an international tribunal with regard to the dispute arising out of that breach. Generally speaking, States accept in advance the jurisdiction of an international tribunal with regard to their disputes only on condition that that jurisdiction be limited and *ratione materiae* and, as regards the point with which we are concerned, *ratione temporis*. Consequently, the agreements concluded by States for this purpose often include a clause limiting the jurisdiction of the judicial or arbitral body in question to disputes concerning "facts" or "situations" *subsequent* to a specific date.<sup>29</sup> Clearly, however, if in the clause in question the

sists solely in the judgement of the last body which renders the achievement of the result required by the obligation definitively impossible; this is so by virtue of the rule that complete reparation must be made for damage. We feel, however, that this rule in itself does not mean that the damage for which "complete" reparation must be made must have been "completely" caused by the breach of an international obligation. The damage resulting from a "complex" internationally wrongful act of the State certainly requires complete reparation, designed to compensate for the injuries caused by all the successive actions or omissions of the State which constituted that act, but this is because all these actions or omissions contribute to the commission of a single breach which, although it is completed and rendered final only by the last was nevertheless initiated by the first. By this first action or omission, the State missed its first opportunity to achieve the result required by an international obligation incumbent on it. If, on the other hand, only the last of the actions or omissions of a State in a specific case proved to conflict with an international obligation, and that had not been true of the previous actions or omissions, only the last would be accounted an internationally wrongful act. It cannot be said in this case that the international legal consequences of that act should include reparation for possible damage attributable to the earlier actions or omissions which were in no way internationally wrongful.

<sup>29</sup> A clause of this kind is included in several bilateral treaties providing for the judicial or arbitral settlement of disputes between the parties, for example, the treaty between Spain and Belgium of 19 July 1927, on which the jurisdiction of the International Court of Justice in the Barcelona Traction Light and Power Company, Limited case was based (*I.C.J. Reports 1964*, pp. 39-40). The General Act for the Pacific Settlement of International Disputes of 26 September 1928 (art. 39) permitted the parties, in acceding to the Act, to exclude from the procedure described in that instrument "Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said Party may have a dispute" (League of Nations, *Treaty Series*, vol. XCIII, p. 361). A reservation having the same effects was also included in numerous unilateral declarations of acceptance of the compulsory jurisdiction of the Permanent Court of International Justice, for example, that formulated by France on 25 April 1931, which limited that acceptance to "any disputes arising after ratification... with regard to *situations or facts subsequent to ratification*" (see *P.C.I.J. Series A/B*, No 74, p. 22) and which played an important role in the Phosphates in Morocco case. Currently, a limitation expressed either in these terms or in others which are more or less similar is included in the declaration of acceptance of the compulsory jurisdiction of the International Court of Justice by Belgium (17 June 1958), Canada (7 April 1970), El Salvador (26 November 1973), India (18 September 1974), Israel (17 October 1956), Japan (15 September 1958), Kenya (19 April 1965), Luxembourg (15 September 1930), Malawi (12 December 1966), Mexico (28 October 1947), New Zealand (8 April 1940), the United Kingdom (1 January 1969) and the Sudan (2 January 1958) (see *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions: List of Signatures, Ratifications, Accessions, etc. as at 31 December 1977* (United Nations publication, Sales No. E.78.V.6), pp. 11-24).

It is also interesting to note that limitations along the same lines



words "facts and situations" is understood as meaning facts giving rise to a legal dispute and, hence, facts which according to one of the parties do not constitute a breach of an international obligation, the determination of the time of that breach may be decisive for the purpose of establishing the jurisdiction of the tribunal in the case concerned. For example, in the case of a "continuing" act that began prior to the date from which the jurisdiction of the tribunal has been accepted, that jurisdiction clearly cannot be recognized if the *tempus* of that wrongful act is taken to be only the moment on which the conduct of the State began, disregarding the fact that that conduct assumed a continuous character. On the other hand, it would seem illogical to deny that jurisdiction if the "continuing" act is considered to have been perpetrated during the whole of the period comprised between the beginning and the end of the conduct of the State. There is no doubt that, for at least part of its existence, the act in question would be an act "subsequent" to the point of departure of the tribunal's jurisdiction. If, on the other hand, the act giving rise to the dispute is a "composite" act and consists, for example, of a "practice" resulting from a series of similar individual acts committed in a number of separate cases, the jurisdiction of the tribunal will be incontestable if the time of the breach is taken to be only the time, subsequent to the crucial date, of the occurrence of the individual acts which, added to those that took place previously, reveal that the conduct of the State taken as a whole has the character of a "practice" and lead to that complex of acts as such being recognized as a breach of an international obligation. The situation would be quite different if the *tempus* of a breach of this nature was taken to be the whole of the period extending from the first to the last of the individual acts constituting the "practice". However, even then, it

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are to be found in certain declarations of acceptance of the jurisdiction of the European Commission of Human Rights with regard to applications submitted by individuals. In its declaration of 14 January 1966, the Government of the United Kingdom recognized that jurisdiction "in relation to any act or decision occurring or any facts or events arising subsequently to the 13th of January, 1966\*" (*Yearbook of the European Convention on Human Rights, 1966*, vol. 9 (The Hague, 1968), p. 8). Similarly, the Italian Government, in its declaration of 20 June 1973, accepted that jurisdiction in relation to "any act or decision occurring or any facts or events arising subsequently to this date\*" [31 July 1973] (*Yearbook of the European Convention on Human Rights, 1973*, vol. 16 (The Hague, 1975), p. 10).

On the other hand, recognition of the jurisdiction of an international tribunal may be limited to facts and situations arising prior to a certain date, although such cases are much more unusual. At the beginning of the Second World War, for example, several States involved in that conflict excluded from the effects of their recognition of the compulsory jurisdiction of the Permanent Court of International Justice, which they had previously accepted, disputes relating to facts and situations arising after the beginning of the war. The declaration of acceptance of the compulsory jurisdiction of the International Court by New Zealand, which is dated 8 April 1940, excludes from that acceptance "Disputes arising out of events occurring at a time when His Majesty's Government in New Zealand were involved in hostilities\*" (*League of Nations, Treaty Series*, vol. CC. p. 492). It is interesting to note that the effects of this declaration were added to those of the preceding declaration, which excluded from the acceptance disputes arising prior to 29 March 1930.

might be questioned whether the fact that some of those individual acts—including precisely those which revealed or at least confirmed the over-all significance of the conduct of the State and its wrongfulness—occurred after the crucial date would not be sufficient grounds for concluding that the "practice" as such existed after that date and thus came within the jurisdiction of the tribunal. Again, the act in connexion with which it was necessary to determine the jurisdiction of the tribunal could be a "complex" act, consisting of a succession of actions or omissions, either by the same organ or, more frequently, different organs, which, one after another, prevented the result required by an international obligation from being achieved in a specific case. The answer to the question whether the tribunal has jurisdiction would then logically be in the affirmative if the time of the breach were taken to be solely that of the conclusive act, subsequent to the crucial date, which gave the breach its final character; on the other hand, the reply would be negative if the time of the breach were taken to be the time of the first action or omission which set in motion the breach process before the crucial date. Lastly, if both these solutions were rejected and if it were assumed that the "complex" act was committed during the whole of the period between the first action or omission and the last, there would be grounds for questioning whether, in this case too, the fact that the breach, although initiated at an earlier stage, was not rendered complete and final until after the crucial date should not mean that the breach should be regarded as an act which continued to exist after that date and that the jurisdiction of the tribunal should therefore be recognized. Here again (as in the case of the "composite" act mentioned above), the answer will depend first of all on the interpretation of the clause of the agreement providing for the limitation of the jurisdiction of the tribunal *ratione temporis*. However, the clause in question will rarely be worded in such a way as to state explicitly, to use the words of Professor Reuter, whether the specific will of the parties to a given agreement was that "acceptance of the optional jurisdiction concerns only *delicts* all elements of which are subsequent to the crucial date" or whether it concerns all those "of which at least one element is subsequent to the date in question".<sup>30,31</sup> Apart from this case, it seems undeniable that, while remaining within the context of the interpretation of the clause, the solution of the intertemporal question concerning jurisdiction must be based on the criteria by which

<sup>30</sup> Reuter, *loc. cit.*, p. 99.

<sup>31</sup> In making their reservations, some States occasionally use a number of terms whose interpretation leaves no doubt as to their intention to exclude from the jurisdiction of the Court any dispute arising not from a "fact" but from any element of a fact occurring prior to the crucial date. For example, India, in its declaration of 18 September 1974, excluded from its acceptance of the jurisdiction of the International Court of Justice "any dispute *the foundations, reasons, facts, causes, origins, definitions, allegations or bases* of which existed prior to this date". However, this example remains an isolated one; in most cases Governments confine themselves to mentioning, in the clauses in which they express their

the time of the internationally wrongful act giving rise to the dispute submitted to the tribunal is determined.<sup>32</sup>

24. The determination of the amount of reparation payable by the perpetrator of an internationally wrongful act and that of the jurisdiction *ratione temporis* of any judicial or arbitral body which may eventually be involved are not the only questions on which the determination of the time and duration of an internationally wrongful act may have a specific bearing. For example, there is the question of the requirement relating to the "national character of a claim", according to which a State is authorized to intervene for the purpose of the diplomatic protection of an individual only if there is a link of nationality between the State and the individual concerned. According to a well-established rule, this link must have existed without interruption from the time of the commission of the internationally wrongful act which injured the individual until the time when the claim is submitted through the diplomatic channel or, where appropriate, the time when an appeal is submitted to an international tribunal. In our view, it stands to reason that, in cases where the breach of an international obligation extends over a period of time, the national link between the victim of the breach and the State which intends to provide diplomatic or judicial protection must have existed without interruption since the beginning of the *tempus* of the commission of the breach. It is therefore not possible to regard as sufficient a link of nationality established subsequently, for example during the last period of the commission of a "continuing" wrongful act, or at the time of the last of the individual acts which, taken together as a series, constitute a "composite" wrongful act, or at the time of the conduct which rendered final a "complex" wrongful act.<sup>33</sup>

(Foot-note 31 continued.)

reservations, the "situations and facts subsequent" to a given date. Unless the intention of the parties is revealed clearly by recourse to other means of interpretation, for example *travaux préparatoires*, it will be necessary to have recourse to the actual concept of "situation and facts", as it may occur in various hypothetical cases, in order to determine the scope of these clauses.

<sup>32</sup> For these reasons we can therefore endorse the remark of Reuter (*loc. cit.*, p. 99) to the effect that the problem raised here is primarily one of interpretation, but not his assertion that concepts such as that of the complex delict do not provide a solution to this problem. Concerning all the problems mentioned here, see also Ago, *loc. cit.*, p. 518.

<sup>33</sup> Reuter (*loc. cit.*, pp. 98 *et seq.*) denies the existence of the relationship which we believe exists between the determination of the *tempus* of a "complex" delict and the determination of the national character of a claim by invoking the fact that the requirement relating to that character goes beyond the conclusive moment of the commission of the wrongful act in question. In our view, however, this writer forgets the essential point, which is not the *dies ad quem* but the *dies a quo* of the commission of the internationally wrongful act. In other words, if it is true that the national character must exist without interruption from the time when the act was committed until the submission of the claim, it necessarily follows that that character exists at the time when the perpetration of the wrongful act ends. But if the act is one of those whose perpetration involves, as Professor Reuter says, a "depth of time", the national character must have already existed previously, namely, during the whole of the period between the beginning and the end of the commission of the act. In our view,

25. As recalled above,<sup>34</sup> the Commission based the provisions of article 18, paragraphs 3 to 5, of the draft articles on a classification of various types of acts of the State which, although different, possess a common feature in that their commission extends over a period of time and can thus give rise to various problems of an intertemporal character. The problem relating specifically to the contemporaneous relationship which must exist between the "force" of an international obligation and the performance by a State of a given act in order for that act to constitute a breach of the obligation in question was considered and solved separately for each of the specific cases examined. To a certain extent, the criteria established to that end can be used to determine those which must now be used to define the time of the occurrence of various types of internationally wrongful acts.<sup>35</sup> Of course, the answer given to the question considered at that time does not provide a complete solution to our current problem. Determining the existence of a breach of an international obligation is one thing, but determining the time of the breach whose existence has been established in another. In other words, the concern for consistency which should guide us in solving problems which are separate but logically characterized by a certain parallelism should prevent us from applying in these two cases contradictory ideas leading to conclusions which are difficult to reconcile. A similar concern for consistency will be required, for the same purposes and within the same limits, in connexion with the solutions adopted in article 21, paragraph 2, and article 22, with regard to the determination of the conditions for the occurrence of a breach of certain international obligations of result,<sup>36</sup> or the solution set forth in article 23 with regard to the conditions for the occurrence of a breach of an obligation requiring the prevention of a given event.

the duration of an internationally wrongful act of this kind undeniably has a bearing on the determination of the date of origin of the national character which must be possessed by the claim originating in the act in question.

<sup>34</sup> See para. 21 above.

<sup>35</sup> When the Special Rapporteur referred in section 3 (Force of the international obligation) to the existence of certain special categories of internationally wrongful acts which could be described as "continuing", "composite" and "complex", he was careful to point out that the distinction between those different concepts would be studied in greater depth in connexion with the fixing of the *tempus commissi delicti* and its consequences (*Yearbook ... 1976*, vol. II (Part One), p. 21, foot-note 101). The relationship and at the same time the difference between the question dealt with in article 18, paragraphs 3, 4 and 5, and the question of determining the *tempus commissi delicti* was mentioned by several members of the Commission during the discussion.

<sup>36</sup> The following example is intended to clarify the ideas we are seeking to express: article 18, paragraph 5, provides that:

"If an act of the State which is not in conformity with what is required of it by an international obligation is a complex act constituted by actions or omissions by the same or different organs of the State in respect of the same case, there is a breach of that obligation if the complex act not in conformity with it begins with an action or omission occurring within the period during which the obligation is in force for that State, even if that act is completed after that period."

It seems clear that the content of this provision makes it rather difficult to envisage a solution which would exclude from the *tem-*

26. As was observed,<sup>37</sup> the determination of the *tempus commissi delicti* of a so-called “instantaneous” act in principle presents no special problems and above all no problems going beyond the simple verification of the circumstances in which certain factual elements occurred. The concept of the “instantaneous wrongful act”, as it emerges from the general theory of internal law, is that of a breach which, as its name indicates, is characterized by the instantaneousness of the conduct of which it consists, and hence that of an offence which ends as soon as it is committed. Frequently cited examples are murder, bodily injury inflicted on an individual, and arson. In the international sphere, examples of “instantaneous” wrongful acts occur when the anti-aircraft defence units of one country shoot down an aircraft lawfully flying over that country’s territory, when the torpedo boat of a belligerent sinks a neutral ship on the high seas, or when the police of one State kill or wound the representative of another State or kidnap an individual in foreign territory. It is not difficult to determine the *tempus* of such “instantaneous” wrongful acts, for they last only for the actual instant during which they are committed. It goes without saying that the duration of an offence of this kind comprises only the time of its execution proper; conceiving the idea, even providing for the conditions that could facilitate its execution, and so on, constitute steps towards the breach, but not its actual commission. The duration of any preparatory activities thus has no bearing on the determination of the *tempus commissi delicti*.

27. Another element which need not be taken into account for the purpose of determining the time of the occurrence of an “instantaneous” internationally wrongful act is its effects or eventual consequences. Blows and injuries inflicted on an alien by members of the police or the army may have lasting effects on his health, his ability to work and his ability to perform his duties; the plundering of a foreign citizen may deprive him of the possession of his property for a certain time or even permanently if no remedial action is taken; the destruction of aircraft or ships

*pus* of the commission of a complex act the action or omission with which that act began. On the other hand, there is no reason why the time of the act in question must be considered as being limited to the duration of that initial action or omission. Article 21, paragraph 2, and article 22 provide that, in the two cases to which those provisions refer, there is a breach of the obligation requiring the achievement of a specified result only if the State fails to achieve that result by other conduct, subsequent to that by which it created an initial situation not in conformity with that result. Thus these articles, too, would be difficult to reconcile with a solution which would be tantamount to excluding that subsequent conduct from the time of the commission of the complex wrongful acts to which they refer, even if it did not make it necessary to consider that *tempus* as limited to that of that conduct. The consequences which flow from a joint consideration of article 18, paragraph 5, and article 21, paragraph 2, of the draft with regard to the determination of the *tempus* of a complex internationally wrongful act were noted by various members of the Commission and are contained in the report of the Commission on its twenty-ninth session (*Yearbook ... 1977*, vol. II (Part Two), p. 29, document A/32/10, chap. II, sect. B, article 21, para. (32) of the commentary, and foot-note 103).

<sup>37</sup> See para. 21 above.

belonging to a neutral State will in the future deprive that State of those means of transport or defence and might even affect the potential of its air force or navy for a long period. The durable character of these effects will be taken into consideration for the purpose of determining the damage for which reparation is to be made, but will have no bearing on the duration of the act which caused them, which will remain an “instantaneous” act. The Commission has already had occasion to touch on this aspect of the problem in its commentary to article 18, always in connexion with the requirement that the “force” of the international obligation and the occurrence of the act which allegedly constitutes a breach of that obligation should be contemporaneous.<sup>38</sup> At that time, the Commission stressed the clear difference between a “continuing wrongful act”, consisting of a breach which, as such, extends over a period of time, and an “instantaneous act producing continuing effects”, consisting specifically of a breach which does not lose its instantaneous character, whatever the nature of its effects. This distinction may be particularly important in connexion with the question, mentioned above,<sup>39</sup> of the jurisdiction *ratione temporis* of an international tribunal. Consideration of the *Phosphates in Morocco* case, another aspect of which has already been analysed by the Commission in its report on its twenty-ninth session,<sup>40</sup> is once again instructive in this connexion. In its description of the terms of the dispute, the Permanent Court of International Justice noted that the Italian Government asserted, as a subsidiary complaint, that the decision of the Department of Mines of 8 January 1925 had deprived the Italian citizen Mr. Tassara of his vested rights and was inconsistent with the international obligations of France. With a view to proving that the case was subject to the jurisdiction of the Court, the applicant Government contended not only that the decision of the Department of Mines had been followed, and completed as an internationally wrongful act, by a denial of justice consummated after the crucial date,<sup>41</sup> but also, in the words of the Court, that

... the dispossession of M. Tassara and his successors constituted a permanent illegal situation which, although brought about by a decision of the Department of Mines, was maintained in existence at a period subsequent to the crucial date ...<sup>42</sup>

However, the reasoning on this point in the decision of 14 June 1938—despite a certain lack of clarity, due

<sup>38</sup> See *Yearbook ... 1976*, vol. II (Part Two), p. 93, document A/31/10, chap. III, sect. B, article 18, para. (21) of the commentary. See also for more details *Yearbook ... 1976*, vol. II (Part One), p. 22, document A/CN.4/291 and Add. 1–2, para. 63 and foot-note 103.

<sup>39</sup> See para. 23 above.

<sup>40</sup> See *Yearbook ... 1977*, vol. II (Part Two), pp. 38–40, document A/32/10, chap. II, sect. B, draft articles on State responsibility, article 22, paras. (25)–(28) of the commentary. See also *Yearbook ... 1977*, vol. II (Part One), pp. 28–29, document A/CN.4/302 and Add. 1–3, paras. 66–69.

<sup>41</sup> The analysis of the case by the Commission in its report on its twenty-ninth session concerned this particular aspect of the case.

<sup>42</sup> *P.C.I.J.*, Series A/B, No. 74, p. 28.

primarily to the fact that the two theories of the Italian Government were intermingled—reveals that, according to the Court, the breach of international law, in so far as there really was a breach, consisted of the decision of the Department of Mines of 8 January 1925. According to the Court, it was that decision which had deprived the Italian citizen of the rights which he claimed, and that decision could not be subject to the jurisdiction of the Court, even if its harmful consequences remained in existence up to and beyond the crucial date. Without using precisely these words, the Court thus considered—correctly, it would seem—that the 1925 decision was an “instantaneous act producing continuing effects” rather than a “continuing act” of a lasting nature. The same belief emerges clearly from the separate opinion of Judge Cheng Tien-hsi, which states:

So far as the decision of the Mines Department is concerned, it is right in holding that the dispute has arisen in regard to a fact anterior to the crucial date, because the decision was given in 1925. If it was wrongful, it was a wrong done in 1925. If it subsists, it subsists simply as an injury unredressed; but it does no new mischief, infringes no new right, and therefore gives rise to no new fact or situation.<sup>43</sup>

Apart from the decisions of the Permanent Court of International Justice, the Commission has already recalled<sup>44</sup> that the judicial practice of the European Commission of Human Rights has brought out the distinction between an “act producing lasting effects” and an act consisting of a “continuing violation” of an international obligation. According to the European Commission, any act, such as a judicial or arbitral decision, which merely produces lasting effects remains an “instantaneous act”, and its consequences are no more than “simple effects” and not an extension of the commission of the act.

28. At the beginning of this section,<sup>45</sup> it was also noted that, in addition to wrongful acts characterized as “instantaneous”, there are others which extend over a period of time as such, and not only as a result of the effects they produce: these acts may therefore be called “continuing wrongful acts”. In internal law, the concept of “continuing delict” (expressed in terminology which varies according to language and legal system) is commonly used to define precisely those acts which extend—remaining identical—over a more or less lengthy period of time, such as illegal restraint, unlawful possession of the property of others, receiving stolen property, illegal possession of weapons, and so on. In international law, the same concept is applicable to many acts: maintenance in force of provisions incompatible with the provisions of a treaty, failure to adopt legislative or other measures required by a treaty, unlawful detention of a foreign official, unlawful occupation of part of the territory of another State, the maintenance of armed contingents in another State without its consent, the unlawful blockading of foreign coasts or ports, and

so on.<sup>46</sup> In this connexion, the Commission has already considered the specific problem—which it solved in article 18, paragraph 3—of expressing, in connexion with an act in this category, the general requirement that the “force” of an international obligation and the performance of an act of the State not in conformity with that obligation should be simultaneous in order for a breach of the latter to exist. The Commission solved the problem by formulating the principle that there is a breach of the obligation with which the “continuing” act is not in conformity when that act takes place, at least partly, while the obligation is in force with regard to the State which performs the act.<sup>47</sup> By not requiring specifically that this simultaneity should exist at the time when the continuing act begins, and requiring only that it should exist at any time during the performance of the act, the Commission also implicitly took a position with regard to the general problem with which we are now concerned, namely, that of determining the time of the occurrence of a continuing internationally wrongful act. In defining the rule as it did in article 18, paragraph 3, it expressed its belief that the *tempus commissi delicti* of a continuing act performance comprises the whole of the period during which it was committed, from the beginning to the end. The Commission’s current task is thus facilitated for, as has been said, a simple concern for consistency

<sup>46</sup> In the “Observations and submissions” which it submitted to the Permanent Court of International Justice on 15 July 1937 in connexion with the Phosphates in Morocco case, the Italian Government expressed itself thus:

“If we take the general category of internationally wrongful acts, we can distinguish therein two different types of delicts. On the one hand, there are breaches of international law, for example an insult to the flag of a friendly nation, the torpedoing of a neutral ship, and so on, which are immediate in character. When such a breach is accomplished, that is, when it has become complete, it is then exhausted and no longer exists as such. On the other hand, there are other breaches of international law which extend over a period of time, so that when they have become complete, in the sense that all their constituent elements are present, they do not thereby cease to exist but continue, remaining identical with a permanent character. This is true, for example, of the enactment of a law contrary to international law, the unlawful seizure of property belonging to an alien, the arrest of a diplomat and so on. ... In considering the typical case of a State which neglects to bring its internal legislation into harmony with the obligations imposed by treaties, Mr. Triepel expresses himself very precisely as follows: ‘If at a given time States are internationally obliged to have rules of law with a given content, the State which already has such laws is breaching its obligation if it repeals them and fails to re-enact them, whereas the State which does not yet have such laws breaches its obligation merely by not introducing them: both States thus commit ... a *délit permanent international* (*völkerrechtliches Dauerdelikt*) [*permanent international delict*]’ (see Triepel, *Völkerrecht und Landesrecht*, Leipzig, 1899, p. 288).” (*P.C.I.J.*, Series C, No. 84, p. 494).

It should be noted that the French legal term corresponding to the German term *völkerrechtliches Dauerdelikt* is “*délit continu*” (*continuing delict*) rather than “*délit permanent*” (*permanent delict*).

<sup>47</sup> In so doing, the Commission took as a basis the recent judicial practice of the European Commission of Human Rights (de Becker case and others). See *Yearbook of the International Law Commission*, 1976, vol. II (Part Two), p. 93, document A/31/10, chap. III, sect. B, article 18, para. (21) of the commentary and foot-note 436); and *ibid.*, vol II (Part One), p. 22, document A/CN.4/291 and Add. 1–2, para. 63.

<sup>43</sup> *Ibid.*, p. 36.

<sup>44</sup> See the references in foot-note 38 above.

<sup>45</sup> See para. 21 above.

should prevent the Commission from contradicting, in its formulation of a general principle, the idea which rightly guided it in its consideration of a particular aspect of what is basically a single problem. Moreover, from the standpoint of legal logic, there would be no justification for departing or deviating in any way from the position which the Commission has adopted thus far regarding the question under consideration.

29. Furthermore, such a course would not seem to be justified by respect for the ideas put forward in international practice. In the "Observations and submissions" which it submitted to the Permanent Court of International Justice on 15 July 1937 in the *Phosphates in Morocco* case, the Italian Government contended that, in the case of "permanent" (continuing) internationally wrongful acts, the time of the wrongful act necessarily consisted of "the whole of the period comprised between its beginning and its completion". The Government added:

Moreover, even if one considers the legal concept of the permanent delict in the internal legal order, one generally finds that the legislation, practice and doctrine of States accept the principle that the permanent or durable offence is considered as being committed throughout the duration of the offence itself, and that the *time of the delict* in the case of a *permanent delict* ... should be taken to be the entire period during which that delict occurred.<sup>48</sup>

The Court, in its aforementioned decision of 14 June 1938, in no way contested the general principle thus formulated by the Italian Government. Although the majority of the Court rejected the Italian claim, it did so because it considered the use of those concepts by the applicant in the case under consideration to be unfounded. The judges making up the majority considered that the acts invoked by the Italian Government did not have the character which the latter attributed to them and rejected the contention that one could, on the basis of the terms of the clause limiting *ratione temporis* the acceptance of compulsory jurisdiction by France, consider as subsequent to the crucial date acts which, although extending over a period of time, originated in measures taken prior to that date.

30. Nevertheless, we feel that some of the statements made by the majority of the Court are open to criticism. We noted above<sup>49</sup> that, among the acts invoked by the Italian Government, the one which it mentioned in its subsidiary complaint—namely, the negative decision taken in 1925 by the Department of Mines with regard to the claim presented by Mr. Tassara—was undoubtedly an instantaneous act producing continuing effects rather than a continuing act *stricto sensu*. We very much doubt, however, whether the same can be said of the situation invoked in the main complaint, namely, the monopoly of the Moroccan phosphates established by the *dahirs* [decrees] of 27 January and 21 August 1920. In our view, that constitutes a typical case of a "continuing act": a legislative situation regarded as contrary to the international obligations of the country which

created it and which, while it began before the crucial date, continued to exist thereafter and to create a situation which remained both current and internationally wrongful. The Court should perhaps have observed that, far from being subsidiary, the real complaint of the Italian Government throughout the case concerned the refusal of the Department of Mines to acknowledge the licences of Mr. Tassara and that the "monopolization" of the Moroccan phosphates constituted rather the background to the Italian argument, on which was superimposed the eviction of the Italian citizen, which constituted a genuine independent complaint and was the source of the dispute between the two countries. The Court could also have added that the only injury actually caused to an Italian citizen by the legislative régime of the monopolization of the Moroccan phosphates was that suffered by Mr. Tassara as a result of the 1925 decision of the Department of Mines, so that necessarily we always return to that decision and its date, which antedates the acceptance of compulsory jurisdiction. However, instead of basing its reasoning on these grounds, the majority of the Court chose to reason as follows:

What the Italian Government refers to as the 'monopolization of the Moroccan phosphates' has been consistently presented by that Government as a régime instituted by the dahirs of 1920, which, by reserving to the Maghzen the right to prospect for and to work phosphates, have established a monopoly contrary to the international obligations of Morocco and of France. It contends that this régime, being still in operation, constitutes a situation subsequent to the crucial date, and that this situation therefore falls within the Court's compulsory jurisdiction.

The Court cannot accept this view. The situation which the Italian Government denounces as unlawful is a legal position resulting from the legislation of 1920; and, from the point of view of the criticism directed against it, cannot be considered separately from the legislation of which it is the result. The alleged inconsistency of the monopoly régime with the international obligations of Morocco and of France is a reproach which applies first and foremost to the dahirs of 1920 establishing the monopoly. If, by establishing the monopoly, Morocco and France violated the treaty régime of the General Act of Algeciras of April 7th, 1906, and of the Franco-German Convention of November 4th, 1911, that violation is the outcome of the dahirs of 1920. In those dahirs are to be sought the essential facts constituting the alleged monopolization and, consequently, the facts which really gave rise to the dispute regarding this monopolization. But these dahirs are 'facts' which, by reason of their date, fall outside the Court's jurisdiction. ...<sup>50</sup>

We feel that the majority of the Court did not take a correct view when, as a result of this reasoning, which is in the final analysis somewhat ambiguous, it in fact regarded the monopoly régime of the phosphates as a simple lasting consequence of certain allegedly instantaneous acts, that is, the legislative acts of 1920. Whether real or not, the international wrongfulness of the monopoly alleged by the applicant Government concerned the existence and maintenance of that régime and not solely the acts which instituted it. The normative situation not in conformity with international requirements merely began with the adoption of the 1920 *dahirs*

<sup>48</sup> *P.C.I.J.*, Series C, No. 84, pp. 494–495.

<sup>49</sup> Para. 27.

<sup>50</sup> *P.C.I.J.*, Series A/B, No. 74, pp. 25–26.

and continued unchanged after that crucial date. That point was clearly appreciated by Judge Cheng Tien-hsi, who, in his separate opinion, sought precisely to stress that, in the case of the phosphates monopoly instituted in Morocco in 1920, the question of determining the "time" of the wrongful act should receive an answer quite different from that which he himself had given regarding the 1925 decision of the Department of Mines. He expressed himself in the following terms:

But the same cannot apply to the question of the monopoly. For the monopoly, though instituted by the dahir of 1920, is still existing to-day. It is an existing fact or situation. If it is wrongful, it is wrongful not merely in its creation but in its continuance to the prejudice of those whose treaty rights are alleged to have been infringed, and this prejudice does not merely continue from an old existence but assumes a new existence every day, so long as the dahir that first created it remains in force. The case of the monopoly is not at all the same as the case where an injured party has not obtained satisfaction for an alleged injury, which would be a case like the decision of 1925; *nor is it merely the consequences of an illicit act\**, which would mean that the wrong was completed once for all at a given moment. ... it is therefore ... not enough to say that it is a legal position resulting from the legislation of 1920 or that it cannot be considered separately from the legislation of which it is the result; for the essence of the dispute is a complaint against what the Applicant has repeatedly maintained to be the 'continuing and permanent' state of things at variance with foreign rights, rather than the mere fact of its creation,\*... For these reasons, I am of the opinion that the monopoly is not a situation or fact anterior to the crucial date and, in consequence, whatever may be the merits of the claim, the dispute concerning it is not outside the jurisdiction of the Court.<sup>51</sup>

31. With regard to the interpretation of the terms of the clause limiting *ratione temporis* the acceptance of compulsory jurisdiction by the respondent Government, the reasoning of the majority of the Court is equally perplexing. This reasoning was formulated as follows:

In this case, the terms on which the objection *ratione temporis* submitted by the French Government is founded, are perfectly clear: the only situations or facts falling under the compulsory jurisdiction are those which are subsequent to the ratification and with regard to which the dispute arose, that is to say, those which must be considered as being the source of the dispute ... The question whether a given situation or fact is prior or subsequent to a particular date is one to be decided in regard to each specific case, just as the question of the situations or facts with regard to which the dispute arose must be decided in regard to each specific case. However, in answering these questions it is necessary always to bear in mind the will of the State which only accepted the compulsory jurisdiction within specified limits, and consequently only intended to submit to that jurisdiction disputes having actually arisen from situations or facts subsequent to its acceptance. But it would be impossible to admit the existence of such a relationship between a dispute and subsequent factors which either presume the existence or are merely the confirmation or development of earlier situations or facts constituting the real causes of the dispute.<sup>52</sup>

While endeavouring not to, the majority of the Court thus interpreted the clause in question very restrictively. It considered that, under its terms, the respondent Government had intended to limit its accept-

ance of the jurisdiction to disputes related to situations and facts which were not only subsequent to the crucial date but contained only elements subsequent to that date, situations and facts of which nothing existed previously. If there had really been proof of such an intention on the part of the respondent Government, it would then have been possible to regard as outside the Court's jurisdiction any dispute arising out of a "continuing" act if such act had begun before the crucial date and subsequently continued to exist in the same form.<sup>53</sup> However, it is by no means certain that the terms of the French declaration justify the interpretation given by the majority of the Court. Those terms merely limited the acceptance of the jurisdiction to disputes concerning situations or facts subsequent to the date of that acceptance. In our view, the term "subsequent" to a given date applies to any situation or fact which exists as a situation or fact after the date in question and not only a situation or fact which only began to exist subsequent to that date. Judge van Eysinga seems to have recognized this when, in his dissenting opinion, he protested against the "attempt to restrict the scope of the French declaration" by reading into its text "something that it does not contain" and when he stressed that "a dispute 'which arises with regard to situations subsequent to a given date' is something different from a dispute the causal facts of which are subsequent to that date".<sup>54</sup> Once again, however, it is to Judge Cheng Tien-hsi that we owe the most pertinent comments:

It must be remembered that the material words of the French declaration are 'situations or facts subsequent to this ratification', which does not mean quite the same thing as 'situations or facts created after the ratification'. Consequently a situation or fact existing after the crucial date is no less a situation or fact subsequent, although it may have existed also before that date.<sup>55</sup>

32. At all events, and whatever might have been the relative value of the opposing theories in the *Phosphates in Morocco* case, we think that we can confirm, taking up again the line of argument initiated above,<sup>56</sup> that even the opinion expressed by the majority of the Court in no way contradicts the deductions which we believe should be made from the very nature of an act in the category under consideration with regard to the determination of its *tempus commissi delicti*. The fact that this majority led to the rejection of the application of the Italian Government, which was, precisely, based on the "persistence" after the crucial date of a situation which, in its view, constituted a "continuing" internationally wrongful act, in no way disproves our deductions. On the contrary, what we regard as the arbitrary assimilation of a "continuing" act to an "instantaneous" act that nevertheless produces continuing effects and the interpretation (in our view far too restrictive) of the clause limiting the acceptance of compulsory

<sup>51</sup> *Ibid.*, pp. 36-37.

<sup>52</sup> *Ibid.*, pp. 23-24.

<sup>53</sup> See the comments on this subject in the final part of para. 23 above.

<sup>54</sup> *P.C.I.J.*, Series A/B, No. 74, p. 35.

<sup>55</sup> *Ibid.*, p. 37.

<sup>56</sup> See para. 29 above.



jurisdiction by the French Government seem to us to show that without that assimilation and that interpretation the majority would not have felt authorized to deny the competence of the Court in the case in question. It may be noted, in conclusion, that the judgment at no point implies that those who formulated it were opposed to the idea that the duration of an act recognized uncontestedly as a "continuing" act covers the whole period between its beginning and its end.

33. More recently, it has been mainly the European Commission of Human Rights which has had to distinguish between "instantaneous" wrongful acts and "continuing" wrongful acts in order to establish its competence with regard to certain disputes. As mentioned above,<sup>57</sup> the United Kingdom recognized the competence of the Commission with regard to individual applications alleging incompatibility with the United Kingdom's obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>58</sup> of any act or decision or any fact or event occurring after 13 January 1966. With regard to intertemporal cases, the European Commission has evidently adopted different solutions according to the type of acts brought before it. With regard to a "continuing" wrongful act which occurred partly before the crucial date and partly after, it has declared itself competent with regard to the second part of the "act". The Commission has thus recognized that the duration of a "continuing" wrongful act extends beyond the initial time of its perpetration.

In the partial decision of 16 December 1966 in the case of *K. H. de Courcy v. United Kingdom*, for example, the Commission, referring to the applicant's complaint that he was kept in solitary confinement for 20 out of 24 hours over a period of 10 months, commented that:

... even if the said period of ten months was in part subsequent to 13th January, 1966, the conditions of the solitary confinement described do not constitute a violation of the rights and freedoms set forth in the Convention ... it follows that this part of the Application is manifestly ill-founded within the meaning of Article 27, paragraph (2) of the Convention.<sup>59</sup>

Setting aside the substance of the matter, what retains our attention is that the Commission implicitly admitted that the conduct of the State erroneously considered wrongful by the applicant (solitary confinement), although it began before the crucial date, extended beyond that date, so that the Commission deemed itself competent in principle to judge the possible incompatibility of that conduct, for the second part of its duration, with the obligations laid down by the Convention. In the case of *Roy and Alice Fletcher v. United Kingdom*, the applicants complained that, *inter alia*, contrary to the provisions of article 6 of the Convention, they were not brought to trial within a reasonable time. In the de-

cision handed down on 19 December 1967 in this case, the Commission rejected the application on the following grounds:

*Whereas*, with regard to the Applicants' complaints that they were not tried within a reasonable time on the count of arson which was left on the file at the conclusion of their trial in 1961, it is to be observed that, insofar as the complaint relates to the period before 14th January, 1966, under the terms of the United Kingdom's declaration of that date recognising the Commission's competence to accept petitions under Article 25 of the Convention, the United Kingdom only recognises the Commission's competence to accept petitions so far as they relate to acts or decisions, facts or events occurring or arising after 13th January, 1966; whereas it follows that an examination of this part of the Application is outside the competence of the Commission *ratione temporis*;

*Whereas*, moreover, in regard to the period after 13th January, 1966, an examination of this complaint as it has been submitted, including an examination made *ex officio*, does not disclose any appearance of a violation of the rights and freedoms set forth in the Convention and in particular in Article 6.<sup>60</sup>

Thus, in this case also, the Commission recognized its competence to judge the possible incompatibility with the provisions of the Convention of the part of the "continuing" act (failure to bring the applicants to trial), which was subsequent to the crucial date.<sup>61</sup> Underlying these different decisions, there is quite clearly the conviction that a "continuing" internationally wrongful act is an act whose existence extends unchanged in time and whose duration includes the whole period between its beginning and its end. That is the same conviction which has appeared in other well-known decisions of the European Commission of Human Rights (for example, the *de Becker* case, etc.), where it was recognized that certain acts which originated prior to the date of the entry into force of the Convention could, nevertheless, in view of their "continuing" character, since they extended beyond the date in question, constitute violations of the said Convention and thus justify the receivability of applications relating to that "continuing situation".<sup>62</sup>

34. In writings of international law it was, as already mentioned, H. Triepel who was the first, in 1899, to formulate the concept of the "continuing" wrongful act with the consequences deriving from it with regard to the time of the occurrence of this type of act.<sup>63</sup> This concept was subsequently taken up again in various general studies on State responsibility.<sup>64</sup> The question of the *tempus commissi delicti* of the "continuing" internationally wrongful act has,

<sup>60</sup> Council of Europe, European Commission of Human Rights *Collection of Decisions* (Strasbourg), No. 25 (May 1968), p. 86.

<sup>61</sup> M. A. Eissen ("Les réserves *ratione temporis* à la reconnaissance du droit de recours individuel, *Les clauses facultatives de la Convention européenne des droits de l'homme* (Bari, Levante, 1974), p. 94, foot-note 38) cites other unpublished decisions tending in the same direction.

<sup>62</sup> See the references given above in foot-note 47.

<sup>63</sup> H. Triepel, *Völkerrecht und Landesrecht* (Leipzig, Hirschfeld, 1899), p. 289.

<sup>64</sup> See, for example, Decencière-Ferrandière, *op. cit.*, p. 93; Ago, *loc. cit.*, pp. 518 *et seq.*, B. Graefrath, E. Oeser, P. A. Steiniger, *Völkerrechtliche Verantwortlichkeit der Staaten* (Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1977), pp. 60-61.

<sup>57</sup> See foot-note 29 above.

<sup>58</sup> In force for the United Kingdom since 3 September 1953.

<sup>59</sup> *Yearbook of the European Convention on Human Rights, 1967* (The Hague, 1969) vol. 10, p. 382.

moreover, been considered in works on the interpretation of the formula "situations or facts prior to a given date", used in some declarations of acceptance of the compulsory jurisdiction of the Permanent Court of International Justice,<sup>65</sup> or the interpretation of similar formulas contained in the British and Italian declarations of acceptance of the competence of the European Commission of Human Rights with regard to individual applications.<sup>66</sup> All these writers explicitly or implicitly agree in recognizing that the "time" and the "duration" of a continuing wrongful act or a continuing wrongful situation extend beyond the initial time of the occurrence of such act or situation and end only at the final moment of such occurrence.

35. A few brief considerations suffice with regard to the question of the *tempus commissi delicti* of an internationally wrongful act where such act constitutes the breach of an obligation to prevent an event. In section 8 of this chapter, we showed that the occurrence of an internationally wrongful act of allowing an event to occur called for the combination of two conditions: that the event to be prevented should occur and that its occurrence should be made possible by a lack of prevention on the part of certain State organs. The need for the combination of these two conditions is reflected in the text of article 23. That being so, the question which concerns us might be couched in the form of an alternative: should one take, as the time of the occurrence of an internationally wrongful act of this kind, the time at which the event took place or should one include in this time of occurrence the period—short or long and at all events necessarily prior—during which the State organs adopted the negligent conduct which subsequently made the occurrence of the event possible? The answer might give rise to not inconsiderable consequences with regard to the determination of the time of the occurrence of the breach. If the first solution were adopted, the internationally wrongful act of allowing an event to occur would be assimilated, from the viewpoint of occurrence, to an instantaneous act and the "duration" of the event would not normally exceed that of an act in this category. If, on the other hand, the second solution were adopted, the act of allowing an event to occur might sometimes be assimilable, from the angle which interests us, to a continuing act.

36. In actuality, the choice between the two solutions (in so far as there are two solutions in the case which concerns us) cannot be made without first considering the question from the correct viewpoint. In order to do so, it is essential to have clearly in mind the characteristics of the occurrence of a "wrongful act of allowing an event to occur" and the way in

which the two conditions for its occurrence are inter-related. Let us recall what is stated above:

... in order to be able to establish the breach of an obligation in this category, two conditions are required: the event to be prevented must have occurred, and it must have been made possible by a lack of vigilance on the part of State organs. Clearly, a State cannot be alleged to have breached its obligation to prevent a given event so long as the event has not actually occurred, and the same is true where the feared event has occurred but cannot be ascribed to a lack of foresight on the part of certain State organs. In other words, *neither the occurrence of the event without there having been any negligence on the part of State organs nor such negligence without the occurrence of any event in itself constitutes a breach of the international obligation. Only the combination of these two elements permits the conclusion that there has been such a breach.*<sup>67</sup>

An internationally wrongful act of allowing an event to occur is thus different from a wrongful act which occurs progressively in time through a succession of distinct State actions or omissions, of which the first begin, in a given case, the breach of an international obligation and the others complete its occurrence. The obligation which a State breaches by an act of allowing an event to occur is not an obligation requiring the adoption of any specific measure but an obligation to prevent, in so far as is humanly possible, the occurrence of a given event. Before the event occurs, the conduct of the State is thus neither an entirely completed wrongful act nor the beginning of a wrongful act on which the event confers a definitive character. It is the unforeseen occurrence of the event and its combination with the conduct of the State which determines the wrongfulness of that conduct, rather like a catalyst which, when placed in contact with a given substance, provokes a reaction in the latter.

37. That being so, it seems clear that, seen in the light of the true nature of an internationally wrongful act of allowing an event to occur, the question of the *tempus commissi delicti* of an act of this kind becomes clearer. Finally there is no alternative left, because the question can be answered in only one way. In no way can one consider the occurrence of such an act as beginning before the time at which the event, by occurring, determines the wrongfulness of the conduct of the State which did not prevent it when it could have done. True, the event itself may appear as something purely instantaneous or something relatively durable. However, the distinction between these two possibilities, apart from being apparently devoid of practical consequences, cannot in any case affect the problem under consideration. The "time" of the internationally wrongful act of allowing an event to occur is the time when the event in question occurs, because it is at that very time that the obligation to prevent its occurrence is breached by the State.<sup>68</sup>

<sup>65</sup> See for example, J. Fischer Williams, "The optional clause (the British signature and reservations)", *British Year Book of International Law*, 1930 (London), vol. 11, pp. 74-75; R. Montagna, "La limitazione *ratione temporis* della giurisdizione internazionale obbligatoria", *Scritti giuridici in onore di Santi Romano* (Padua, CEDAM, 1940), vol. III, pp. 130 et seq.

<sup>66</sup> See, for example, Eissen, *loc. cit.*, pp. 94-95.

<sup>67</sup> Para. 3.

<sup>68</sup> We might imagine the case where the event—for example, the occupation of a foreign embassy by a group of terrorists—occurs without the local State being liable to reproach, but where this State becomes guilty subsequently of inertia in the face of such an occupation. In such a case, the State would be committing a



38. In its commentary to article 18, paragraph 4, of the draft articles,<sup>69</sup> the Commission took into consideration another category of acts whose occurrence also extends over a period of time in order, as in the case of the other paragraphs of the same article, to determine the operation, with regard to this particular kind of act, of the general requirement of simultaneity in time between the occurrence of the act of the State and the "force" for the State of the obligation in question. The acts to which we refer are those for which the Commission adopted the term "composite", in order to convey the idea that it was a question of State acts, each of which was composed of a plurality of separate specific acts relating to separate specific cases but all necessary for the fulfilment of the conditions for the breach of a specific international obligation. As the Special rapporteur also pointed out in his fifth report on State responsibility,<sup>70</sup> the separate acts which, in the aggregate, would constitute a breach of an international obligation may, severally, be internationally lawful. It is also possible, and even frequent, for each of them to be itself an internationally wrongful act, but wrongful, let us note, in relation to an international obligation other than that which determines the wrongfulness of the act as a whole.<sup>71</sup> In the final analysis, consequently, the distinctive common characteristic of a State act of the type under consideration is that it should comprise a sequence of actions—which, taken separately, may be lawful or unlawful—which are interrelated by having the same intention, content and effects, while relating, as we have just said, to different specific cases.

39. It is by no means difficult to formulate hypotheses concerning the object of the international obligation which the "composite" act may breach. It may be, for example, that State A has undertaken, by a treaty on establishment and economic co-operation, to permit in general terms participation by nationals of State B in the exploitation of certain of its own mineral, agricultural or marine resources and that, in execution of this obligation, a number of concessions have been granted to individuals or corporations belonging to State B. Let us suppose that, subsequently, one of these concessions is expropriated for specific motives. Such expropriation may in itself be internationally irreproachable, having been carried out with due regard for the international rules relating to the expropriation of foreign prop-

erty. It may also be internationally wrongful, either on the basis of a conventional obligation whereby, for example, the two States are bound not to expropriate assets belonging to their respective nationals, or on the basis of a customary obligation, for example, because of lack of adequate compensation. However, the expropriation does not in itself constitute a breach by State A of its obligation to permit generally participation by nationals of State B in the exploitation of its own economic resources. If, on the other hand, the first expropriation is followed by a whole series of others, the total effect of which is actually to reduce such participation to nil, the aggregate measures thus taken clearly constitute a breach of the obligation which State A has assumed by concluding with State B the treaty on establishment and economic co-operation. In other words, State A is then merely achieving by a plurality of separate acts, forming as a whole a "composite" act, the same internationally wrongful objective which it would have achieved by a "single" legislative or other act, excluding in general the nationals of State B from the exercise of any economic exploitation activity in its territory.<sup>72</sup>

40. Another example, actually the one most frequently cited in attempts to explain the concept of a "composite" internationally wrongful act, is furnished by the breach of an obligation prohibiting the State to which it applies from adopting a "discriminatory practice" with regard to the access of aliens from a specific country to the exercise of an activity or profession. Where such a prohibition exists, the isolated rejection of an application submitted by one national of the said country cannot in itself be

breach of an international obligation, but the obligation breached would not be the obligation to prevent the occurrence of the event. We would then no longer be faced with a wrongful act of allowing an event to occur, which is a hypothesis necessarily linked to the "occurrence" of the event.

<sup>69</sup> See *Yearbook ... 1976*, vol. II (Part Two), p. 93, document A/31/10, chap. III, sect. B, article 18, para. (22) of the commentary.

<sup>70</sup> *Ibid.*, vol. II (Part One), p. 22, document A/CN.4/291 and Add. 1-2, para. 65.

<sup>71</sup> The Special Rapporteur referred to this hypothesis in his 1939 course on "Le délit international" (*loc. cit.*, p. 523), commenting that to the plurality of State actions there then corresponds "a plurality of delicts, a plurality of breaches of an international obligation different from that breached by the aggregate act".

<sup>72</sup> See again Ago, *loc. cit.*, pp. 522 *et seq.* In the Phosphates in Morocco case, the Italian Government had given a description of the complaint made by it under the head of "the monopolization of Moroccan phosphates for the benefit of France", which, from certain aspects, could be compared to the description which we are giving here of a "composite" internationally wrongful act. It had spoken, in that regard, of an "offence resulting from the union of several successive breaches interlinked by the same felonious intention and aimed at the gradual achievement of the same programme" (observations and submissions of the Italian Government, *P.C.I.J.*, Series C, No. 84, p. 488). Later, in its further observations, it had presented the case as that of a "single" act, but one deriving its intrinsic character from the "combined result" of a series of breaches (*ibid.*, pp. 851 *et seq.*). In order to define that type of act, the Italian Government had invoked the concept of "continuing" offence, borrowed from the criminal law of certain countries, to which the French Government had objected that a concept of criminal law was inapplicable in the interpretation of a conventional provision of international law (*ibid.*, pp. 720 *et seq.*). Not adopting any position on the question of principle, the Court, in its decision, denied the existence in fact of the links alleged to exist by the Italian Government between some of the elements which that Government wished to include in the aggregate single act of "monopolization". However, despite the similarities of form already noted, it is easy to see that the parallel is purely apparent. The fact that the Italian Government considered each of the elements composing the "single" act termed "monopolization of Moroccan phosphates" as a breach of the same rule of law breached by the said single act makes it impossible to consider the case referred to by the Italian Government as corresponding to the concept of a "composite" internationally wrongful act as we understand and define it in this report. This conclusion is reinforced by a consideration of the nature of the links which, according to the applicant, existed between those elements.

considered a breach of the prohibition.<sup>73</sup> If, however, applications submitted by nationals of that country are systematically rejected by the State authorities in a whole series of cases, the rejections taken as a whole definitely constitute the discriminatory "practice" which it had been the intention to prevent and thus clearly conflict with what is required of the State by the obligation. Furthermore, in its commentary to article 18, paragraph 4, the Commission has already drawn attention to the fact that, in the practice of the United Nations Economic and Social Council, consistent violation of human rights and fundamental freedoms has come to be established as an offence in itself, distinct from the offence constituted by an isolated violation of those rights and freedoms.<sup>74</sup> The concept of a composite internationally wrongful act is thus applicable in this context also.

41. How is the problem of the determination of the *tempus commissi delicti* to be resolved with regard to an act falling within the category whose distinctive characteristics we have just defined? In this regard, referring to the considerations set forth above,<sup>75</sup> we deem it essential to emphasize above all that the time when the existence of a "composite" internationally wrongful act is revealed and the time to which, once it is revealed, its actual existence must be backdated must not be confused. What makes it possible to discern the presence of a "composite" act is clearly not the first individual act of the series which it will subsequently be seen to have inaugurated. It is after a whole series of individual acts of the same kind that the "composite" act will be revealed; one of these acts will make it apparent that what is involved is not merely an accidental succession of isolated acts but an aggregate act which as such merits a separate definition.<sup>76</sup> It is clear that, once the existence of this "other" act is revealed, the aggregate of individual acts constituting it, since its commencement, are thereby affected. For example, as soon as it is re-

<sup>73</sup> Such a rejection may, on the other hand, in itself constitute a breach of another international obligation—in the case where, for example, the State in question is linked to the State of origin of the person in question by a treaty requiring that nationals of the latter State be allowed to exercise a specific activity or profession on a footing of full equality with nationals of the former State.

<sup>74</sup> See *Yearbook ... 1976*, vol. II (Part Two), p. 94, document A/31/10, foot-note 438.

<sup>75</sup> See para. 23 above.

<sup>76</sup> It is precisely this circumstance which, as we said in paragraph 23, seemed to us decisive for the purpose of answering the specific question of the establishment *ratione temporis* of the jurisdiction of an international tribunal. We shall confirm here the conclusion which we reached on this point: if the interpretation of the clause limiting the jurisdiction of the tribunal in time led us to consider this jurisdiction as limited solely to those acts of which "all the elements" were subsequent to the crucial date, a composite internationally wrongful act would not be within the jurisdiction of the tribunal unless the whole series of acts were subsequent to that date. But if, on the contrary, this restrictive interpretation is not necessitated by an explicit text on the subject, we think that, so long as the duration of a composite internationally wrongful act overlaps with the crucial date, the date of the individual act which revealed both the existence and the wrongfulness of the composite act should be taken as decisive for this specific purpose. The jurisdiction of the tribunal would thus have to be accepted so long as the conduct in question took place after the crucial date.

vealed that, by a succession of individual expropriation measures, the State is achieving the global exclusion of aliens from the exercise of a specific activity or that, by a series of specific cases of discrimination, the State is engaging in a real discriminatory "practice", such exclusion or such practice are deemed to have begun with the first measure of the first case in the series. Otherwise, one would arrive at the absurd result of recognizing, for example, the existence of a practice in a single action. We should add—and this very important—that, if subsequently similar actions were to be added to the already established series, the "composite" act would automatically be augmented by all those individual subsequent acts. We therefore conclude without any possible hesitation that a composite internationally wrongful act extends in time from the first of the successive State acts composing it up to the last act added to it. At first glance, it might be thought that a reservation or restriction should be made to that conclusion by reason of article 18, paragraph 4, which specifies, with regard to our hypothesis, the general requirement of contemporaneity between the "force" of an international obligation and the occurrence of a breach of that obligation. In the case where the obligation in question entered into force after the beginning of a specific series of individual State acts or ceased to be in force before the end of the series, this provision indicates that only the individual acts occurring while the international obligation prohibiting the said composite act is in force for the State can be taken into consideration for the constitution of a "composite" internationally wrongful act. In actuality, that is a question of specification and not a derogation from or restriction on the principle set forth above. It is true that the *tempus commissi delicti* of a composite act can be measured only by taking account of the individual acts occurring while the international obligation in question is in force for the State which committed them. However, that is for the very simple reason that, when an obligation is not in force for a specific State, there cannot be, with regard to the obligation in question, any possible wrongful act on the part of that State and thus no possible contribution by this State, by any action, to the formation of a "composite" internationally wrongful act. The conclusion that the *tempus commissi delicti* of a composite internationally wrongful act corresponds to the whole period elapsing between the first and the last of the individual State acts which contribute to the formation of this aggregate internationally wrongful act admits of no reservation or exception.

42. In order to conclude this examination of the different types of internationally wrongful act whose commission is not immediate but extends over periods of time that may be extremely lengthy (thereby giving rise to difficulties in respect of the determination of the *tempus commissi delicti*), one last category of State acts remains to be considered. We have characterized these acts as "complex", as this adjective seems to convey most aptly their characteristic feature, namely, that of being constituted by a suc-

cession of actions or omissions by the same organ or, more frequently, by different organs, all of which, however, relate to a single case. This category of State acts is certainly not a new element in the context of the Commission's study of the problems of international responsibility. Two of its aspects have been dealt with in the articles already approved. In article 18, paragraph 5, the Commission defined, as it had in previous paragraphs for other types of internationally wrongful act, the criterion which "adapts" to the specific character of a "complex" act the general principle requiring that the "force" of the international obligation in question and the commission of the State acts which are alleged to be a breach of that obligation should be contemporaneous. The commission then set forth in article 21, paragraph 2, and article 22 rules for determining the existence of an internationally wrongful act constituted by a "complex" act of the State. These rules highlight the particular importance that this concept assumes when one seeks to explain the way in which the breach of certain obligations commonly found in certain sectors of international law occurs, namely, the obligations that require the State to achieve, by the means of its choice, a specified result, and which accord it, in addition to this initial choice, the right to redress, by the adoption of new means, any improper situation to which the means initially employed may have given rise in a particular case, so as to achieve in a second stage the internationally required result—or at least an equivalent result. It is with special reference to these already established points that we drew attention<sup>77</sup> to the necessity of ensuring that the solutions adopted in spheres having in common the presence of a temporal factor do not appear to be in conflict, and also the necessity of not confusing the separate issues resolved in the aforementioned articles and the subject-matter of the article we now intend to formulate.

43. The fundamental hypothesis of a "complex" internationally wrongful act is therefore that of an offence which, having commenced or been set in train by the action or omission of a State organ through its failure at the outset to achieve, in a specific case, the result required by an international obligation, is then completed and brought to an end by further actions, sometimes by the same organ but more often by other organs, relating to the same case at a subsequent time. In other words, the "complex" internationally wrongful act is the aggregate of all the actions or omissions by State organs at successive stages in a given case—each of which actions or omissions could have ensured the internationally required result but failed to do so. We have already given specific examples of such acts, and others could be added: acquittal at all the successive jurisdictional levels of the perpetrators of a crime against the representative of a foreign Government; denial of justice for a foreign national as a result of an aggregate of decisions handed down by the whole gamut of ju-

dicial authorities approached; breach, in a given case, of a conventional obligation regarding the treatment to be accorded to the nationals of a particular country, or to nationals of a particular ethnic origin, as a result of the joint effect of successive acts by organs belonging to different branches of the State power; and so forth. Thus, it is in respect of acts structured in this way that we raise the question how to determine, specifically in relation to such acts, the *tempus commissi delicti*, the time at which the international offence was committed.

44. The question of the *tempus commissi delicti* of a "complex" internationally wrongful act—and also, as we have seen, of a "continuing" act<sup>78</sup>—arose in the *Phosphates in Morocco* case. However, the aspects of this case which are of interest in relation to the question now under consideration have already been analysed by the Commission in the part of its commentary to article 22 concerning the determination of the existence of the breach of an international obligation of result in the specific case in which the recognition of such breach is subject to the condition that the individuals benefiting from the obligation must have first exhausted internal remedies without avail.<sup>79</sup> It will therefore suffice to summarize the essential facts of the case and to dwell on certain points which have a particular bearing on the question under consideration.

45. In this case, the Italian Government maintained, though as a subsidiary complaint, that the Italian company *Miniere e Fosfati* was being dispossessed of its vested rights<sup>80</sup>—a dispossession which, it claimed, resulted from the decision of the Department of Mines of 8 January 1925 and the denial of justice which had followed it, in breach of the obligation incumbent on France to respect those rights. According to the applicant Government, this constituted an internationally wrongful act, which had unquestionably been initiated by the 1925 decision, but which did not become complete and final until the acts in 1931 and 1933, by which the French Government had refused to make available to the Italian nationals concerned effective means of redress against the disputed decision,<sup>81</sup> and it was therefore a standard case of a "complex" internationally wrongful act. Here is what the applicant Government had to say in its written observations concerning the intertemporal aspects of the breaches of obligations of result effected by the acts described above:

... It is only when there is, as a final result, a failure to fulfil these obligations that the breach of international law is complete and that, consequently, there is a wrongful act capable of giving rise to an international dispute. In this case, the international obligations incumbent on the protecting Power in regard to the treatment to be accorded to the company *Miniere e Fosfati* as an

<sup>78</sup> See above, paras. 29–32.

<sup>79</sup> See *Yearbook ... 1977*, vol. II (Part Two), pp. 38–39, document A/32/10, chap. II, sect. B, article 22, paras. (25) to (27) of the commentary.

<sup>80</sup> *P.C.I.J.*, Series A/B, No. 74, p. 27.

<sup>81</sup> See the observations and submissions of the Italian Government, 15 July 1937 (*P.C.I.J.*, Series C, No. 84, p. 493).

<sup>77</sup> See para. 25 above.

Italian national did not require that they should be fulfilled exclusively by certain organs. These obligations prescribed, in particular, that this company should share effectively in the profits yielded by the mining concessions; but there was as yet no decisive evidence that such a result had been set aside by the Department of Mines. ... So long as a possibility of redressing the situation in accordance with these obligations existed—and if there had been a serious intention in this respect, no opportunity would have been more favourable than that of a revision of the decision of the Department of Mines by the highest authority of the Protectorate—there was no ground for stating that there had occurred a complete and final internationally wrongful act, giving rise to the international responsibility of the State, and creating an international dispute.<sup>82</sup>

And in its oral pleadings it added:

... It was not until 28 January 1933 that the protecting State declared that it did not intend to take any measures to achieve the effect required by international law and that it wished to take advantage of the opportunity furnished by its own judicial law to make final the dispossession of the Italian nationals. It was at that precise moment, therefore, that the breach of conventional law was actually accomplished; it was at that precise moment that the final breach of the obligation to allow the Italian nationals to benefit from the concessions régime was actually accomplished.<sup>83</sup>

Naturally, the thesis thus developed enabled the Italian Government to maintain that the offence constituted by a succession of acts extending over the years 1925–1933 and becoming final in 1933 was to be regarded in the aggregate as an act “subsequent” to the date on which France accepted the compulsory jurisdiction of the Court. It seemed to the Italian Government absurd to state “that the Court could not hear a dispute concerning an internationally wrongful act which had been completed in 1933, merely because one of its constituent elements existed prior to the crucial date”.<sup>84</sup>

46. It is characteristic that, confronted by this argument, neither the respondent Government nor the Court itself voiced objections to the fundamental thesis developed by the applicant Government.<sup>85</sup> In the final analysis, what the French Government<sup>86</sup> and also the Court<sup>87</sup> contested with well-sustained arguments was that, by employing that fundamental thesis, it was possible, in that case, to overcome the objection regarding the Court’s lack of jurisdiction *ratione temporis*. The gist of the Court’s argument was that the refusal in 1933 to grant the request to make available an extraordinary means of redress—in view of the lack of judicial organization—was not a denial of justice which could be considered as an ad-

ditional element of the act giving rise to the dispute but merely a refusal to settle in a certain way a dispute arising from an already “complete” breach of international law. Mr. Basdevant, the French Government agent, had shrewdly perceived that it would be difficult to exclude completely the possibility that “the wrongful act referred to the Court” might have been “constituted by the 1925 decision of the Department of Mines and the denial of justice, taken together”. He therefore chose to assert that the denial of justice, if denial of justice there had been, was also prior to France’s acceptance of the compulsory jurisdiction and dated back to the time of the vain efforts made by the Italian national injured by the decision of the Department of Mines to have that decision revised, and that consequently the alleged lack of judicial organization as regards means of redress was also prior to the crucial date.

47. There is certainly no reason for us to discuss here the merits of the Court’s decision in this case. As far as the subject-matter of our study is concerned, we can even take these merits for granted. In concluding the consideration of this decision, it suffices to indicate that the decision merely denied that the case could be fitted into the theoretical framework contemplated by the applicant Government. As regards the positions of the parties, it seems pertinent to note: (a) that, in this important judicial case, the applicant openly asserted, in regard to the definition of concepts, the existence of a category of internationally wrongful acts constituted by a succession of separate State acts relating to the same case, all of which taken together, however, contributed to the commission of the offence, and that it therefore explicitly and systematically discarded the possibility of considering as the *tempus commissi delicti* of a wrongful act of this type the sole moment of the initial action or omission of the series; (b) that, by virtue of the position which it adopted, the respondent, far from raising a theoretical objection to the principles espoused by the applicant, agreed to reason on the basis of cases in which a breach of an international obligation might occur “at more than one moment”. The respondent probably would not have done so had it believed that the “moment” of an internationally wrongful act must in all cases be taken to mean exclusively the moment of the initial conduct of the State in the matter.

48. In order to reflect an opinion of indirect interest for our subject, we may also mention some of the decisions of the European Commission of Human Rights. We have stated that the United Kingdom recognized the Commission’s competence with respect to individual applications relating to any act or decision occurring or any facts or events arising subsequently to 13th January, 1966, and that a similar reservation was made by Italy.<sup>88</sup> Unfortunately, only part of the decisions of this Commission has been published; it is not therefore always possible to know the European Commission’s attitude towards appli-

<sup>82</sup> Further observations of the Italian Government, 21 February 1938 (*ibid.*, p. 850).

<sup>83</sup> Statement by counsel for the Italian Government, session of 12 May 1938 (*ibid.*, No. 85, pp. 1232 *et seq.*)

<sup>84</sup> *Ibid.*, p. 1233. See also the rejoinder of 16 May 1938 (*ibid.*, p. 1334).

<sup>85</sup> This important fact has already been emphasized in the Commission’s commentary to article 22 (*Yearbook ... 1977*, vol. II (Part Two), p. 39, document A/32/10, chap. II, sect. B, article 22, para. (28) of the commentary).

<sup>86</sup> See especially the oral pleading of 5 May 1938 of the agent of the French Government (*P.C.I.J.*, Series C, No. 85, pp. 1048 *et seq.*).

<sup>87</sup> *P.C.I.J.*, Series A/B, No. 74, p. 22.

<sup>88</sup> See foot-note 29 above.

cations directed against an act or a decision prior to the crucial date, but in respect of which the internal remedies were not exhausted until after that date. However, we know of two published decisions which shed some light on the attitude possibly adopted by the Commission in this respect. The first relates to a case in which the applicant complained about the procedure followed by the State organs of the United Kingdom with regard to the expropriation of property belonging to her and claimed that she had not received adequate compensation.<sup>89</sup> The decision to expropriate was taken prior to the crucial date, whereas the last of the decisions handed down in this case was subsequent thereto. As the Commission held that the application was inadmissible, it might at first be thought to subscribe to the idea that the *tempus* of the wrongful act alleged by the applicant was the moment of expropriation. But this is not the case: the decision that the application could not be entertained was based on grounds other than the existence of the United Kingdom's reservation *ratione temporis*. The effect of this reservation on the case was simply not taken into consideration. This being so, there is sound justification for believing that, but for the other reasons on which the European Commission's decision in this case was founded, the fact that the final decisions handed down in the case were subsequent to the crucial date would have sufficed for the Commission to recognize its competence from the intertemporal standpoint. The second decision also concerned a claim relating to the amount of compensation granted for expropriation.<sup>90</sup> The applicant claimed that the last of the decisions by the United Kingdom authorities in the case (and the one which, in her opinion, should be considered as final) was subsequent to the crucial date. The discussion centred on whether the final decision in the case was actually the one alleged by the applicant or the one indicated by the Government, which was prior to the crucial date. The Commission endorsed the Government's opinion in this respect and, on that basis, declared that it had no competence *ratione temporis* with respect to the claim. Thus, in this case, too, one may assume that the Commission would have recognized itself competent if it had held, like the applicant, that the final decision in the case was a decision rendered after the crucial date.<sup>91</sup> Without resorting to conjecture, it may

be noted that the important point is that the European Commission considered that the date to be taken into account for the purpose of determining whether an act was prior or subsequent to the crucial date was not the date of the initial State conduct in the case—in this instance, that of the act of expropriation—but that of the decision embodying the final ruling on the applicant's appeals.

49. The findings which have derived from an attentive study of the scant material of relevance provided by international judicial decisions are thus in no way in conflict with those which are dictated mainly—as we have said—by juridical logic and the desire to be consistent with the position already adopted towards questions which have links with the problem currently under consideration. We can now, therefore, formulate our conclusions regarding the determination of the *tempus commissi delicti* of the category of acts which we have just considered, the last of the three categories which present the characteristic feature of acts whose time of commission extends beyond their beginning. It seems to us out of the question to consider as the “time” of commission of a complex internationally wrongful act the sole moment of the initial conduct of the State authority in the case, namely that which, as we have repeatedly stated, opened the *iter* of the breach but did not close it. The subsequent conduct of the said authority and of other higher authorities in the same case must be taken into consideration for the same reason, including the final conduct which set the seal on the breach of the international obligation. At the same time, it would clearly be equally inadmissible only to take account, for the purposes indicated, of this final conduct, and to overlook the conduct which preceded it, beginning, of course, with the initial conduct, which at the outset defined the actual character of the breach and which, to a large extent, determined its injurious consequences. Our conclusion about the “time” of an offence defined as a “complex” internationally wrongful act and characterized by a succession of separate State actions or omissions contributing to its occurrence has affinities with the conclusion which we have already given in respect of an offence characterized as a “composite” internationally wrongful act.<sup>92</sup> The breach of an international

<sup>89</sup> Decision of 4 February 1970, application No. 3651/68 (Council of Europe, European Commission of Human Rights, *Collection of Decisions* (Strasbourg), No. 31 (August 1970), pp. 72 *et seq.*).

<sup>90</sup> Decision of 14 December 1970, application No. 4430/70 (*ibid.*, No. 37 (October 1971), pp. 112 *et seq.*).

<sup>91</sup> We know of no published decisions referring to Italy's reservation to its declaration accepting the competence of the European Commission of Human Rights. It may nevertheless be of interest to refer in this respect to the work of G. Sacerdoti, “Epuisement préalable des recours internes et réserve *ratione temporis* dans la déclaration italienne d'acceptation du droit de requête individuelle”, *Les clauses facultatives de la Convention européenne des droits de l'homme* (Bari, Levante, 1974), pp. 133 *et seq.* We have reservations concerning this writer's ideas on the general scope of the rule of the exhaustion of internal remedies, as set forth in

article 26 of the Convention for the Protection of Human Rights and Fundamental Freedoms, but it is worth noting that, on the question of the breach of an international obligation by judicial organs, the writer considers there is no breach of an international obligation, and consequently no genesis of international responsibility, until the highest internal jurisdiction has delivered a verdict in which it confirms the disputed judgements of the lower authorities. The internationally wrongful act is then seen as a “complex” act and the breach must be regarded, according to Mr. Sacerdoti, as subsequent to the crucial date if the final decision itself is subsequent, even though the decision of the lower authority constituting a miscarriage of justice is prior to that date (*ibid.*, p. 145).

<sup>92</sup> With regard to the effect of this conclusion on the determination of the jurisdiction *ratione temporis* of an international tribunal with respect to a dispute arising from a complex internationally wrongful act whose occurrence allegedly overlaps with the crucial date, it is sufficient for us to refer to the considerations set forth above (see final part of para. 23).

obligation constituted by a "complex" internationally wrongful act extends over the entire period between the action or omission which initiated the breach and that which completed it.

50. This last conclusion completes the series of conclusions which it was our duty to draw in regard to the determination of the time of the breach of an international obligation for each of the separate hypothetical cases of wrongful acts which may occur in international legal life. The Special Rapporteur considers that it now remains for him to propose to the Commission the following definition of the rule relating to the question considered in this section.

*Article 24. Time of the breach  
of an international obligation*

1. If a breach of an international obligation is constituted by an instantaneous act, the time of the breach is represented by the moment at which the act occurred, even if the effects of the act continue subsequently.

2. If a breach of an international obligation is constituted by an act having a continuing character, the time of the breach extends over the entire period during which the act subsists and remains in conflict with the international obligation.

3. If a breach of an international obligation is constituted by a failure to prevent an event from occurring, although prevention would have been possible, the time of the breach is represented by the moment of the occurrence of the event.

4. If a breach of an international obligation is constituted by an aggregate act composed of a series of similar individual acts, committed in a plurality of separate cases, the time of the breach extends over the entire period between the first and the last of the individual acts constituting the series in conflict with the international obligation.

5. If a breach of an international obligation is constituted by a complex act consisting of a succession of actions or omissions by different organs of the State in respect of the same case, the time of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it.

## CHAPTER IV

### Implication of a State in the internationally wrongful act of another State

#### INTRODUCTION

51. The possibility that a State—or a subject of international law other than a State—may in some way or other be implicated in an internationally wrongful act of another State—or of another subject of international law—was first mentioned in the Special Rapporteur's third report.<sup>93</sup> It was then announced, though in very general terms, that the particular problems liable to arise in a case of this kind would

be specifically examined when examination of the subjective element (chapter II) and objective element (chapter III) of the internationally wrongful act had been concluded and the establishment of the rules relating to determination of the general conditions for the existence of such an act of the State had thus been completed. Similar statements appeared in the reports of the Commission on its twenty-fifth<sup>94</sup> and twenty-sixth<sup>95</sup> sessions. More specifically, in its report on its twenty-seventh session, the Commission stated that when the essential questions relating to the subjective element (chapter II) and the objective element (chapter III) of the internationally wrongful act had been settled, the problems raised by the possible implication of other States in the internationally wrongful act of a given State would remain to be considered in chapter IV. In that connexion, reference was made to the notions of incitement, assistance and complicity, and to those relating to what is generally called "indirect responsibility".<sup>96</sup> The same expectations are expressed in the Commission's reports on its twenty-eighth<sup>97</sup> and twenty-ninth<sup>98</sup> sessions. The time has therefore come to devote some attention to the special situations mentioned in the passages cited.

52. The cases to be considered can be divided into two conceptually different categories. In the first are the cases in which the existence of an internationally wrongful act unquestionably committed by a State, attributable to it as such and without the slightest doubt involving its international responsibility, is accompanied by the existence of participation by another State, or by another subject of international law, in the commission by the first State of its own act. The characteristic element of this case is, precisely, the link between the conduct in fact adopted by a State—which, in isolation, may not in certain cases be internationally wrongful in any way—and the act committed by another State, the wrongfulness of which, on the other hand, is established. The problem which then arises is to establish whether such participation does not become tainted with international wrongfulness by the mere fact of being contributory to the commission of an internationally wrongful act by another State. Consequently, the question also arises whether such participation should not cause the participating State to bear some share of the international responsibility of the other State or, in any case, also to incur international responsibility itself.<sup>99</sup>

<sup>94</sup> *Yearbook ... 1973*, vol. II, pp. 171–172, document A/9010/Rev. I, para. 51.

<sup>95</sup> *Yearbook ... 1974*, vol. II (Part One), p. 275, document A/9610/Rev. I, para. 120.

<sup>96</sup> *Yearbook ... 1975*, vol. II, p. 59, document A/10010/Rev. I, para. 50.

<sup>97</sup> *Yearbook ... 1976*, vol. II (Part Two), pp. 71–72, document A/31/10, para. 72.

<sup>98</sup> *Yearbook ... 1977*, vol. II (Part Two), p. 9, document A/32/10, para. 29.

<sup>99</sup> It need hardly be said that, if the actions constituting participation by a State in the commission of an internationally wrongful act by another State constituted a breach of an international obli-

<sup>93</sup> *Yearbook ... 1971*, vol. II (Part One), p. 205, document A/CN.4/246 and Add. 1–3, para. 29.



53. The second category, on the other hand, contains cases distinguished by another characteristic. Here, the point to be considered is not the part which may in fact be played by a State in the independent commission of an internationally wrongful act by another State, but the existence of a particular relationship between two States. The decisive element is the existence of a situation, in law or in fact, entailing grave limitation of the freedom of decision and action of one of the States to the advantage of the other, either permanently or only on the specific occasion of the commission of the wrongful act in question. The question which then arises is whether the acts committed by the first State, in certain conditions, in breach of its international obligations, should not, from the standpoint of their legal consequences, be treated as if they were acts of the second State. In other words, it is necessary to determine whether the price of the situation established in favour of the second State is not to make that State indirectly responsible, at the international level, for the wrongful act constituted by the actions in question, in place of the State which committed them.

54. The two separate cases described above will be examined separately in the two sections forming this chapter.

#### 1. PARTICIPATION BY A STATE IN THE INTERNATIONALLY WRONGFUL ACT OF ANOTHER STATE

55. To establish the rule of international law governing the subject-matter of this section, it is necessary first to delimit the subject itself precisely. It is important to distinguish clearly between the situations to which we mean to refer, and others with which any analogy is only apparent. Previous articles of the present draft have dealt, for example, with different cases in which organs of a State are guilty of internationally reprehensible actions in the territory of another State, but in none of those cases does any kind of "participation" by a State in the internationally wrongful act of another State appear. Moreover, it is also possible to think of cases in which, on one and the same specific occasion, several States have been found to have engaged in conduct not in conformity with an international obligation. There, too, however, there is no question of participation by one of those States in an internationally wrongful act by another.

56. In the first place, it must be pointed out that the case of actions committed in breach of an international obligation by organs of a State operating in the territory of another State, having been "lent", or "placed at the disposal" of, the latter by the State to

which they belong to, is not one of the cases to be considered in this section. The question of the attribution of such actions was settled by the Commission in article 9 of the draft.<sup>100</sup> Now it is established in that article, and emphasized in the commentary to it, that the actions or omissions of foreign organs performing functions in the exercise of the governmental authority of the State at whose disposal they have been placed—when acting under its authority, direction and control—are acts of that State and not of the State to which the organs belong. Such actions or omissions cannot, therefore, constitute "participation" by the latter State in any internationally wrongful act of the former State. Even supposing that, on a certain occasion, the actions of a foreign organ placed at the disposal of a given State converge with those of national organs of that State towards a specific object, there will then be concurrence, in the commission of a possibly wrongful act, of courses of conduct all attributable to the same State, and not assistance from the conduct of one State in the commission of an internationally wrongful act by another.<sup>101</sup>

57. Secondly, it should be remembered that a case of "participation" in the internationally wrongful act of another cannot be found in the fact, or rather the sole fact, that a State failed to take the preventive or repressive measures required of it with respect to actions committed in its territory by an organ of another State to the detriment of the third State. By such failure, the State in question breaches an international obligation incumbent on it, which is quite different from the obligation breached on its territory by the organ of the foreign State. The murder of a foreign Head of State by organs of State A on the territory of State B, and the failure of State B in its duty to adopt the necessary measures to prevent such an act if possible, or in any case to punish its perpetrators, are two different internationally wrongful acts, each the responsibility of a different State. There is, of course, an undeniable link between the two acts—as there may be in other cases as well—but this link is not sufficient to make one of the acts appear as participation in the other. This does not mean that in specific cases there may not also be participation—in the form of "assistance" or "complicity"—of the territorial State in the internationally wrongful act perpetrated on its soil by the foreign State. But there is then an additional element, a separate breach besides mere failure to prevent and punish. As the Commission has previously em-

<sup>100</sup> *Yearbook ... 1974*, vol. II (Part One) p. 286, document A/9610/Rev.1, chap. III, B.2.

<sup>101</sup> If, on the other hand, an organ of a foreign State, while possibly acting in the interest of the State in whose territory it is, acts in the exercise of elements of the governmental authority of the State whose organ it is, and under the authority, direction and control of that State, it is obviously not an organ "placed at the disposal" of another State and its actions or omissions are exclusively attributable to the State to which it belongs. It is only then that the case of participation by the latter State in the commission of an internationally wrongful act by the State in whose interest the organ acted is conceivable.

gation in themselves, they would on that account already engage the international responsibility of the State which performed those actions, irrespective of any consequences that might follow from the part taken in the internationally wrongful act of another State.

phasized, that failure, as such, can certainly not be defined as a form of complicity.<sup>102</sup>

58. Thirdly, it must be emphasized that there can be no question of the participation of a State in the internationally wrongful act of another State in cases of parallel attribution of a single course of conduct to several States. This is what happens when the conduct in question was engaged in by an organ common to a plurality of States—a case which is not expressly provided for in the articles in chapter II of the draft, but the solution to which is implicit in them. According to the principles on which those articles are based, the conduct of the common organ can, indeed, only be considered as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then two or more States will have concurrently committed separate, although identical, internationally wrongful acts. But it is self-evident that the parallel perpetration of identical offences by two or more States is, conceptually, quite a different thing from participation by one of those States in an offence committed by another.

59. Fourthly, the same distinction must be made in regard to identical offences committed in concert—and, generally, at the same time—by two or more States, each acting through its own organs. If, for example, State A and State B, which are allies, make a concerted attack on a third State, each acting through its own military organs, two separate acts of aggression are committed by the two States; the fact that they acted in concert in no way detracts from the correctness of this finding. Thus the case contemplated is totally different from that of “complicity”, or of any other form of “participation” by one of the two States in an act of aggression committed by the other alone.

60. The particulars given in the foregoing paragraphs have made it possible to delimit by elimination the range of situations to be considered in this section. It has been concluded that from this range must be excluded a series of different situations which, although involving the intervention of organs

belonging—or also belonging—to States other than the State supposed to have committed a specific internationally wrongful act, are nevertheless not characterized by any form of “participation” by those other States in the internationally wrongful act in question. It remains to be established positively, still on a preliminary basis, what the subject-matter of the following analysis should be. This subject-matter is the possible participation of a State in the commission of an internationally wrongful act by another State. The object is therefore to establish the aspects by which the existence of such participation is recognized and the conditions in which legal effect and consequences must be attributed to it precisely for this reason. More specifically, we must determine whether or not the circumstance of such participation has the effect of making wrongful, as constituting participation in the internationally wrongful act of another, an act which otherwise would not be considered wrongful, and, if that act itself constitutes a breach of an international obligation, independently of the circumstance of participation, the effect of adding a further internationally wrongful aspect to that already presented by the act without such participation. We must also determine whether there are cases in which such participation in the act of another acquires the same nature and the same characterization as the act participated in, or whether it always retains a separate nature and legal characterization.

61. From the conceptual standpoint, there are, essentially, three cases in which the problem of the existence or non-existence of “participation” by a State in an internationally wrongful act committed by another State may arise: (a) that in which the first State in some way or other advises or incites the second to commit a breach of its international obligation; (b) that in which the first State exerts pressure on the second to make it commit such a breach; and lastly (c) that in which the first State assists the second in the commission of the breach and thus takes an active part in its commission.

62. The first case is that which, in the general theory of internal law, appears under the name of “incitement” to commit an offence. There can be no doubt that, in internal criminal law, certain forms of incitement by one subject to the commission of an offence or a crime by another subject also constitute a criminal offence. In international law, is it permissible to regard as an internationally wrongful act mere incitement by a State, of another State, to commit such an act? In principle, we still believe that the answer to this question must be in the negative.<sup>103</sup> In international practice, of course, protests have been made against States accused, rightly or wrongly, of having incited other States to commit breaches of international obligations to the detriment of third States; but we do not know of any cases in which, at

<sup>102</sup> In its commentary to article 12, the Commission said:

“For the purposes which draft article 12 has to serve, the provisions laid down in its paragraphs 1 and 2 would appear to suffice. The situations envisaged in the article would certainly take on a different aspect if, in the individual case, it were established that there had been assistance or complicity, in the true meaning of these terms, on the part of organs of the territorial State, in the wrongful acts committed by organs of the foreign State. The case might then exhibit either participation by a State in an internationally wrongful situation created by another State or an internationally wrongful act committed jointly by two States. The act committed by organs of the territorial State and attributed to it as a source of responsibility—independently of the acts concurrently attributed to the State to which the foreign organs belong—would then be something other than a mere failure in the duty to protect third States. A case of this kind would present, rather, one of the situations which the Commission proposes to examine under chapter IV of part I of the draft, dealing with the special problems raised by the participation of several States in the same internationally wrongful act.” (*Yearbook ... 1975*, vol. II, p. 86, document A/10010/Rev. I. chap. II, B.2., article 12, para. (15) of the commentary.)

<sup>103</sup> See Ago, *loc. cit.*, pp. 523–524, and, for a recent concurrence in this opinion, Graefrath, Oeser, and Steiniger, *op. cit.*, p. 64.



the juridical level, a State has been alleged to be internationally responsible solely by reason of such incitement. Nor do we know of any cases in which States have agreed to absolve from its responsibility a State which, although it might have been incited by a third State, nevertheless, of its own free will, breached an international obligation binding it to another State. Here, international jurisprudence and practice do not appear to depart from the classical conclusion formulated by the Board of Commissioners set up to distribute the sum allocated by France under the Convention of 4 July 1831 between the United States of America and France, concerning claims relating to measures for the confiscation of American merchandise taken by certain States under the influence of Napoleonic France. The Board refused to attribute to France responsibility for measures taken by States which, like Denmark, had not, at the time, been formally united to the French Empire or placed in a condition of dependence on that Empire, and were thus independent. The fact that the Danish sovereign had taken measures to please the French emperor played no part in the decisions of the Board of Commissioners.<sup>104</sup> The Board considered the Danish Government as solely and fully responsible for the measures taken.

63. It follows from the foregoing that we are referring here to the case of incitement to commit an international offence applied to a sovereign State which is in a position freely to exercise its sovereignty. As regards that case, it should first be noted that the mere fact that a State has been incited by another State to act in a certain way cannot affect the characterization of its actions or the determination of their legal consequences. The decision of a sovereign State to adopt a certain course of conduct is certainly its own decision, even if it has received suggestions and advice from another State, which it was at liberty not to follow. Consequently, if, by virtue of the con-

<sup>104</sup> See *Notes on some of the questions decided by the Board of Commissioners under the Convention with France of the 4th of July 1831* (Philadelphia, 1836), in J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington D.C., U.S. Government Printing Office, 1898), vol. V, pp. 4473 *et seq.* Commissioner Kane noted, in particular, that the claims against Denmark (Holstein and Hamburg cases), unlike those raised with respect to Holland, represented:

"...a train of wrongs unworthy of a State unquestionably sovereign and professing to be free, committed against the citizens of a friendly nation, who had violated no law, and were entitled to protection by every title of hospitality and justice.

"But the question before the Board regarded not Denmark, but France. One cannot be charged with the acts of the other; for neither was dependent. It may be that the conduct of King Frederic was dictated by his anxiety to conciliate the favour of the French Emperor; ... we had nothing to do with his motives or his fears. The act was his own; the Kingdom of Denmark was then, as now, independent ... [its] intervention ... was the voluntary pander to French avidity."

The passage reproduced here is quoted and commented on favourably by C. L. Bouvé, in "Russia's liability in tort for Persia's breach of contract", *American Journal of International Law* (Washington D.C.), vol. 6, No. 2 (April 1912), p. 399, and by Klein, *Die mittelbare Haftung im Völkerrecht* (Frankfurt-am-Main, Klostermann, 1941), p. 279. The American claims against Denmark were satisfactorily settled by the agreement of 28 March 1830 (Moore, *op. cit.*, pp. 4549, *et seq.*).

duct adopted, the State in question has committed an internationally wrongful act, there can be no question of its avoiding or even reducing its responsibility by alleging "incitement" by another State. And neither the State which committed the internationally wrongful act nor the State injured by it can cast all or part of the responsibility for that act on another State which has done no more than encourage or incite the first State to follow a course of conduct it ultimately adopted with complete freedom of decision and choice. We are therefore clearly outside the framework of the situations which will be considered in the next section. Moreover, it is no less certain that neither the practice of inter-State relations nor the works of writers on international law have claimed separate existence for an international responsibility derived specifically from the fact that a State has incited another State to commit an internationally wrongful act to the detriment of a third State. Mere incitement of one State by another to commit an internationally wrongful act does not fulfil the conditions for characterization as "participation" in the act—at least in the legal meaning of that term, which, as we have seen, is an act having, as such, legal effect and consequences. Lastly, it would be wrong, in our view, to yield to the temptation to make unduly facile and arbitrary comparisons between incitement by a sovereign State of another State to commit an internationally wrongful act and the legal concept of "incitement to commit an offence" in internal criminal law. This legal concept has its origin and justification in the psychological motives determining individual conduct, to which the motives of State conduct in international relations cannot be assimilated.

64. Lastly, it may be noted that the conclusions we have just reached would not be altered in any way if we took into consideration the case in which the State incited to commit an internationally wrongful act is no more than a "puppet State" in the hands of the State inciting it to commit an international offence,<sup>105</sup> or even a State placed, for some reason, in a position of dependence on that other State. Of

<sup>105</sup> A typical example of a puppet State was, in its time, the Kingdom of Holland under Napoleon's brother, Louis, from June 1806 to July 1810, when Holland became a part of the French Empire. As Commissioner Kane observed in his commentary, already cited, to the decisions of the United States/France Board of Commissioners:

"... in placing Louis upon the throne his brother had not renounced his control over the affairs of that country. The form of distinct sovereignties was presented to the public eye; but the energies of the Dutch people were directed more than ever to the advancement of the Imperial policy.

"Holland was already a dependant Kingdom and Louis a merely nominal sovereign." (Moore, *op. cit.*, pp. 4473 and 4474).

On this basis, therefore, the Commissioners accepted the Dutch contention that, at the time, Holland had been under the "present Government of France" and recognized the responsibility of France for the confiscation and sale, for the financial gain of France, of all goods brought to Holland in American ships, even though those measures had been taken by the so-called Kingdom of Holland (Bouvé, *op. cit.*, pp. 398–399; Klein, *op. cit.*, pp. 280–281).

(Continued on next page.)

course, in situations like this, it is possible that, in certain circumstances, the dominant State will be called upon to answer for an internationally wrongful act committed by the puppet or dependent State. But, as was pointed out,<sup>106</sup> and as we shall see more particularly in the next section, which is devoted to the examination of questions of responsibility in such situations, it is then the existence of the relationship established between the two States which becomes the decisive factor in this transfer of responsibility

(Foot-note 105 continued.)

There is no need to go so far back, however, for there are several examples of puppet States in more recent times, particularly in the history of the Second World War. In many of the international disputes which arose out of the breach of an international obligation by one of those puppet States or Governments, the State which was the victim of the breach asserted that the resultant responsibility should be attributed not to the State whose organs had in fact acted, but to the State which, in pursuing its policy in regard to a given State, had created there a kind of pseudo-State, which was really no more than its *longa manus*. In this connexion, reference may be made to disputes about international responsibility for acts committed by States or Governments set up in certain territories occupied by Nazi Germany or Fascist Italy. For acts committed by the organs of the Independent State of Croatia, see, for example, the decision in the Dispute between the Postal Administrations of Portugal and Yugoslavia (United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No. 63.V.3), pp. 339 *et seq.*), and the decision of the United States Claims Commission in the Socony Vacuum Oil Co. case (M. Whiteman, *op. cit.* (1963) vol. 2, pp. 767 *et seq.*). For acts committed by organs of the so-called "Italian Social Republic", see, among many others, the Dame Mossé dispute referred to the Franco-Italian Conciliation Commission established under the Treaty of Peace with Italy of 10 February 1947 (United Nations, *Reports of International Arbitral Awards*, vol. XIII (Sales No. 64.V.3), pp. 492, 493 and 495) and the Treves, Fubini and other disputes, referred to the Italian-United States Conciliation Commission, established under the same Treaty of Peace (*ibid.*, vol. XIV, Sales No. 65.V.4) pp. 265, 266, 271, 427 *et seq.*)

In reality, the very idea of "instigation" or "incitement" of one State by another to commit an internationally wrongful act is conceivable, where the instigation or incitement is applied to a puppet State or Government, only in the extremely rare case in which this form of State acts under the same conditions as a State which is genuinely sovereign and free in its decisions. If the puppet State of Government has committed an internationally wrongful act under these conditions, it seems obvious that the act can only be attributed to itself and must give rise to its own international responsibility, however understandable the temptation may be for the injured State, which has difficulty in obtaining satisfaction, to invoke the joint responsibility of the State to which the offending State owes its existence, asserting that any puppet State or Government is by its very nature liable to be "conditioned" by the "advice" and "incitement" of the State that brought it into being.

However, in most cases the situation is different. Sometimes the entity which it is desired to represent as a separate State or Government is, in fact, wholly subject in its actions to the State which created it, as was the Kingdom of Holland to the French Empire. The actions of the organs of the entity in question are then directly attributable to the latter State (A. Verdross, *Völkerrecht*, 5th ed. (Vienna, Springer, 1964), p. 390; Klein, *op. cit.*, p. 283), in the same way as those of its own organs, or even those of a local authority, a region, a dependent colonial territory, etc. In other cases, which are the most frequent, the puppet State or Government is really a separate subject of international law but the essential sectors of its activity are subject to a system of control by the State which created it. Any internationally wrongful act committed by its organs is then an act which is attributable to it but which indirectly gives rise to international responsibility of the holder of the power of control, as in the other cases which will be considered in the next section of this chapter.

<sup>106</sup> See para. 53 above.

from one subject to the other, and not the specific circumstance of incitement of one State by another to commit a particular wrongful act. It is obvious that in such situations there will be no question, either, of an international responsibility separate from that generated by the wrongful act, for which the incitement, as such, will engage the responsibility of its author.

65. The conclusions stated in the last two paragraphs therefore seem to be inescapable in the first of the three cases described above,<sup>107</sup> namely, that in which a State goes no further than to incite another State to commit an international offence to the detriment of a third State. But would similar conclusions be justified in the second of those cases—that in which a State accompanies its incitement by pressure or coercion?

66. Where a State, in order to make another State commit an internationally wrongful act, has recourse to measures of this kind, it would obviously be difficult to maintain that, like mere "incitement" by persuasion and advice, such measures are legally "neutral" in the eyes of international law. But that is not the point. To find the correct answer to the new question before us, we must first distinguish between the various forms in which the legal wrongfulness of the measures in question may manifest itself. For while some of these forms require attention in the present context, that is not true of others. We should, indeed, run the risk of being diverted from our task if we yielded to the temptation to go into the question whether recourse to coercion or the threat of coercion, or to other forms of pressure, in order to make another State breach its international obligations towards a third State, does or does not, as such, constitute a breach of an international obligation by the first State with respect to the second. On this point there is no doubt that in present-day international law—and by this we mean general international law just as much as the special legal system of the United Nations—coercion *stricto sensu*, including the use or threat of the use of armed force, is considered, save in exceptional cases, to be an international offence of the utmost gravity. Here, indeed, lies the most striking difference between modern international law and that of the beginning of this century. As to the other forms of pressure, in particular economic pressure, it is well known that opinions still differ, some assimilating them quite simply to the internationally prohibited forms of coercion, while others do not see them as internationally wrongful measures, reprehensible though they are. But we must keep clearly in mind that it is in no way incumbent on us to enter into the polemic between the opposing schools of thought on this point, for whatever conclusion we might support, it would have no bearing on the problem we have to set ourselves and to solve. Where we arrived at the conclusion that the taking by State A of certain measures to compel State B to breach its international obligations to State C

<sup>107</sup> See para. 61 above.

was in itself and beyond all doubt internationally wrongful, that would have legal consequences for the relations between A and B. In the most serious cases, it might also conceivably have further consequences for the relations between State A and all the other members of the international community. But that would be of no relevance to our present concern, which is to determine whether recourse to such measures does or does not constitute a form of "participation", by the State taking them, in the breach by the State subjected to the measures of an international obligation binding it to a third State, or, more generally, whether or not the relations between one or the other of the first two States and the third State will be affected by such measures. Solely from the point of view of these relations with the third State, the answer to our question will finally be the same whether the coercion at the origin of the offence against the third State did or did not infringe an international subjective right of the State against which it was exercised.

67. Having set our problem in its proper perspective and excluded from consideration an aspect which must remain foreign to it, it must now be pointed out that coercion—armed force or even economic or some other form of coercion—differs profoundly from mere incitement or instigation. Unlike them, it has the effect of limiting, and sometimes even entirely annihilating, the freedom of choice of the State which, under the coercion, acts in breach of an international obligation to a third State. In this case it certainly cannot be maintained that the State subjected to coercion adopted its conduct towards a third State in the free exercise of its sovereignty. That this is a fact, and indeed a fact which cannot and must not remain without legal consequences, no one can doubt. The question is, however, whether the use of some form of coercion against a State to make it commit an international offence to the detriment of another State must be regarded as a form of participation in the commission of the offence, and be treated as such, or whether it must rather be seen from an entirely different angle.

68. In our view, there should be no doubt about the answer to this question. It would be wrong to say that a State which, in one way or another, applies coercion to another State to make it commit an international offence against a third State, thereby "participates" in the commission of the offence. The commission remains exclusively the act of the State subjected to coercion. The author of the coercion remains entirely foreign to the commission of the offence; it does not carry out any of the actions constituting the offence and gives no aid or concrete assistance in its perpetration. In this sense, therefore, it certainly stops short of what would be real "participation" in the commission of the internationally wrongful act. However, at the same time, its implication in the affair goes well beyond what would constitute participation, for it goes so far as to compel the will of the State it coerces, to the point of constraining it to decide to perpetrate an international

offence which it would not otherwise commit, and obliging it to behave, in the case in point, as a State deprived of its sovereign capacity to take decisions. This, in our opinion, is the determining factor for the purposes of our conclusion. In the case considered, there can be no question of attributing to the State which exercises the coercion a share in the unlawful act committed by another State under the effect of that coercion. That would be justified only if the State in question had taken an active part in performing the act, but, as has just been pointed out, this is not the case. Nor can there be any question of attributing to State A, the coercing State, a separate offence against State C, committed parallel with the internationally wrongful act perpetrated, as a result of the coercion, by State B. In the case in question, State A has not committed against State C any offence separate from that committed by State B. Hence the logical outcome of the situation can only be the same as it inevitably is in the majority of cases in which a State committing an internationally wrongful act is dependent on another State, its will being governed by the will of that State, or, at the least, its freedom of choice being restricted by the control exercised by that other State. Whether this condition of dependence is *de jure* or merely *de facto* in nature, whether it is permanent or purely temporary, or even occasional, makes no difference to our problem. In both the cases, what is important is that the State which committed an international offence did so while its freedom of decision was seriously impaired by another State. The normal consequence of this situation will be dissociation of the subject to which the act generating responsibility is attributed from the subject on which responsibility is laid. In other words, we enter the sphere of responsibility for the act of another.<sup>108</sup>

69. That being so, it appears that the answer to the question put above is self-evident. The case in which one State uses coercion against another to make it breach its international obligation to a third State cannot be defined as a case of "participation" by one State in the commission of an internationally wrongful act by another State. Consequently, this second case does not come within the scope of the provisions of this section either; we shall meet it again, however, among the series of cases of indirect responsibility to which the next section will be devoted.

70. The only real case of "participation" by one State in the commission of an internationally wrongful act by another State is, therefore, the third of those set out above: that in which the first State actively assists the second in the commission of the act.<sup>109</sup> Here, the State in question does not confine itself to inciting another State, by suggestions and advice, to commit an international offence; nor does it resort to coercion to make it do so. By its own

<sup>108</sup> A State which has subjected another State to coercion in order to make it breach its international obligation to a third State cannot escape being called upon to answer internationally for the act committed by the other State under its coercion.

<sup>109</sup> Para. 61.

action, it facilitates the commission of the offence by the other State. Here we enter the sphere of "complicity".

71. It was, moreover, mainly the case of complicity that the members of the Commission<sup>110</sup> and of the Sixth Committee of the General Assembly<sup>111</sup> had in mind when they stressed the need to deal in the present draft with the question of the participation of a State in an internationally wrongful act by another State. One of the examples of complicity most frequently mentioned in the statements of members of the Commission is that of a State placing its territory at the disposal of another State to make it possible, or at least easier, for it to commit an offence against a third State.<sup>112</sup> In this context, reference was made mainly to article 3 (f) of the Definition of Aggression, adopted by the General Assembly in 1974,<sup>113</sup> which includes in the list of acts which qualify as acts of aggression:

The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State.

Another classic and frequently cited example of complicity is that of a State which supplies another with weapons to attack a third State. It is obvious that complicity in an act of aggression may also take other forms, such as the provision of land, sea or air transport, or even the placing of military or other organs at the disposal of the State preparing to commit aggression for use in the case in point. Furthermore, it is by no means only in the event of an act of aggression by a State that the possibility of complicity on the part of another State may arise. Complicity may, for example, also take the form of the provision of weapons or other supplies to assist another State to commit genocide,<sup>114</sup> to support a ré-

<sup>110</sup> See, for example, the statements made by E. Ustor (*Yearbook ... 1975*, vol. I, p. 44, 1312th meeting, para. 13); P. Reuter (*ibid.*, p. 45, para. 28); N. Ushakov (*ibid.*, p. 47, 1313th meeting, para. 4); M. Bedjaoui (*ibid.*, p. 48, paras. 9 and 10); S. Bilge (*ibid.*, p. 58, 1315th meeting, para. 19).

<sup>111</sup> See for example the statements made at the 1975 session of the General Assembly by the representatives of the German Democratic Republic (*Official Records of the General Assembly, Thirtieth Session, Sixth Committee, Summary Records of Meetings*, p. 64, 1539th meeting, para. 3), Turkey (*ibid.*, p. 106, 1547th meeting, para. 20), Iran (*ibid.*, p. 112, 1548th meeting, para. 6), Bolivia (*ibid.*, p. 115 para. 30), during the discussion on the report of the International Law Commission.

<sup>112</sup> This example was cited and illustrated by E. Ustor (*Yearbook ... 1975*, vol. I, p. 44, para. 13) and N. Ushakov (*ibid.* p. 47, 1313th meeting, para. 4), as well as by some representatives to the Sixth Committee during the discussion on article 12 of the draft articles and more particularly on the question of acts committed by the organs of a State on the territory of another State (*Official Records of the General Assembly, Thirtieth Session, Sixth Committee, Summary Records of Meetings*, p. 64, 1539th meeting para. 3; p. 77, 1542nd meeting, para. 2; p. 82, 1543rd meeting, para. 13; p. 86, 1544th meeting, para. 4).

<sup>113</sup> General Assembly resolution 3314 (XXIX), annex.

<sup>114</sup> Article III of the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948 (United Nations, *Treaty Series*, vol. 278, p. 277), includes "complicity in genocide" in the list of acts punishable under the Convention. It is not specified however, whether complicity by another State in the commission of genocide by a particular Government does or does not come within the terms of this provision.

gime of *apartheid*,<sup>115</sup> or to maintain colonial domination by force, etc. Nor is it true to say that the complicity of another is possible only where the internationally wrongful act in which another State participates is one of those defined in article 19<sup>116</sup> as an "international crime". There may equally well be complicity by another State in the commission of a less typical and less serious offence: providing means for the closure of an international waterway, facilitating the abduction of persons on foreign soil, and assisting in the destruction of property belonging to nationals of a third country, are some of the examples that may be mentioned.

72. Among the various forms of complicity in an internationally wrongful act by another, two separate cases may be defined. The conduct by which one State helps another State to commit an international offence may sometimes in itself constitute a breach of an international obligation, quite independently of participation in the wrongful act of the State to which such conduct lends assistance. This would be the case, for example, if a State Member of the United Nations supplied arms to the Government of the Republic of South Africa in breach of the obligation provided for in Security Council resolution 418 (1977) calling for an embargo on the provision of arms to that country. But for the most part, the conduct in question, taken in isolation, will be an act which is not, as such, of a wrongful character. To supply another State, for example, with raw materials, means of transport and even arms, where this is not prohibited by a specific international obligation, is not in itself internationally wrongful in any way. What concerns us, however, in the present context, is not to know whether the conduct as such does or does not constitute a breach of an international obligation but whether or not the conduct adopted by the State was intended to enable another State to commit an international offence or to make it easier for it to do so. The very idea of "complicity" in the internationally wrongful act of another necessarily presupposes an intent to collaborate in the commission of an act of this kind, and hence, in the cases considered, knowledge of the specific purpose for which the State receiving certain supplies intends to use them. Without this condition, there can be no question of complicity.

73. This conclusion, apart from being logical, is in accordance with the conviction of Governments. This appears to be confirmed, for example, by the reply given in 1958 by the British Secretary of State for Colonial Affairs to a parliamentary question con-

<sup>115</sup> Article III of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, adopted on 30 November 1973 by the General Assembly of the United Nations, (resolution 3068 (XXVIII), annex) provides for the criminal responsibility of individuals—including "representatives of the State"—who conspire in the commission of acts of *apartheid* or who directly co-operate in them. It is, however, open to question whether the complicity of another State in the commission of such acts, or in the pursuance of a policy of *apartheid* by a Government, comes within the terms of the Convention.

<sup>116</sup> See foot-note 24 above.

cerning the supply of arms and military equipment by certain countries to Yemen, which subsequently used them in an attack against Aden. By agreement with the Secretary of State for Foreign Affairs, the Colonial Secretary stated that:

... the policy of Her Majesty's Government has always been to urge restraint in the arms deliveries to the Middle East, but *arms deliveries do not in themselves constitute ground for protest.*\* Her Majesty's Government have, of course reported to the United Nations acts of Yemeni aggression on the frontier and have protested to the Yemeni Government.<sup>117</sup>

The comment by E. Lauterpacht on this reply showed the position taken by the spokesman of the United Kingdom Government invoked conclusions on three points: (a) that the supply of arms by one State to another is, in the absence, for example, of any prohibition by the United Nations, quite lawful; (b) that the responsibility for the unlawful use of those arms rests primarily upon the State which receives them; and (c) that these findings do not, however, prevent it being recognized that a State which knowingly supplies arms to another State for the purpose of assisting the latter to act in a manner inconsistent with its international obligations cannot escape responsibility for complicity in such illegal conduct.<sup>118</sup>

Further confirmation of the same conviction is provided by a position taken by the Government of the Federal Republic of Germany the same year. On 15 August 1958, that Government replied to a note of 26 July, from the Government of the Union of Soviet Socialist Republics, which accused the Federal Government of participating in an act of aggression by allowing United States military aircraft to use airfields in German territory in connexion with the American intervention in Lebanon. In its reply, the Federal Government argued that the measures taken by the United States and the United Kingdom in the near East did not constitute an intervention against anyone, but assistance to countries whose independence appeared to be seriously threatened and which had appealed for help. Since, therefore, according to the Federal Government, its allies were not guilty of any aggression in the Near or Middle East, it followed that the accusation made against it (supporting an aggression committed by other States) was unfounded. The Federal Government concluded by giving an assurance that it never had, and never would, allow the territory of the Federal Republic of Germany to be used for the commission of acts of

aggression.<sup>119</sup> Leaving aside its assessment of the actual circumstances of the case, the Federal Government thus showed its conviction, in principle, that the fact that a State placed its own territory at the disposal of another to help it commit an act of aggression would be a form of participation or complicity in the aggression and would thus constitute an internationally wrongful act.

74. We think we have now given a sufficiently accurate idea of what can and should be understood by the "complicity" of one State in the commission of an internationally wrongful act by another State; and we believe we have shown, by examples from recent State practice, that whatever the situation<sup>120</sup> may have been formerly, this notion is now well established in international law. Moreover, the authors of various recent works also give the impression that they incline towards the same conclusion.<sup>121</sup> In any event, we believe we can at least support our position on this point by evoking the intention of progressive development by which, it seems, the international community must necessarily be guided in the matter. This position can be summarized in two points: (a) the conduct of a State, which would not in itself constitute a breach of an international obligation, nevertheless becomes an internationally wrongful act if, through such conduct, the said State becomes an accessory to the commission of an international offence by another State; and (b) any international wrongfulness which may attach to the conduct in question from the outset is supplemented by an additional and separate wrongfulness by reason of the complicity of a State engaging in such conduct in the international offence committed by another State.

75. A further question remains to be settled. Should it be concluded that the act whereby the complicity of one State in the internationally wrongful act of another State is established necessarily partakes of the nature of the latter act? Or, despite the connexion between the act of the accessory and that of, let us say, the protagonist, does the former retain a different identity? Put in concrete terms, should the conduct of a State which provides arms or other means to another State to help it commit aggression or genocide likewise be characterized forthwith as

<sup>119</sup> For the text of the Federal Government's note, see *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Stuttgart), vol. 20, Nos. 2 and 3 (August 1960), pp. 663-664.

<sup>120</sup> In 1939, the Special Rapporteur, describing the situation at that time, was still able to exclude, in principle, from the scope of the rules then in force the idea of complicity in an internationally wrongful act (Ago, *loc. cit.*, p. 523).

<sup>121</sup> This can be said, for example, of I. Brownlie, *Principles of Public International Law*, 2nd ed. (Oxford, Clarendon Press, 1973), p. 443, where he touches on the question of "joint participation in specific actions" and cites as an example the case "where State A supplies planes and other material to State B for unlawful dropping of guerrillas and State B operates the aircraft". See also, by the same author, *International Law and the Use of Force by State A supplies planes and other material to State B for unlawful dropping of guerrillas and State B operates the aircraft". See also pacht and of certain members of the International Law Commission and the Sixth Committee of the General Assembly (footnotes 110 and 111).*

<sup>117</sup> British Institute of International and Comparative Law, *International and Comparative Law Quarterly* (London), vol. 7 (July, 1958), pp. 550-551.

<sup>118</sup> "The Answer appears to proceed on the basis that the supply of arms by one State to another is, in the absence, for example, of any prohibition by the United Nations, quite lawful. In addition, the Answer suggests that the responsibility for the use of those arms—at least in the circumstances referred to in the Answer—must rest primarily upon the State which receives them. There is, however, nothing in the Answer to support the view that a State which knowingly supplies arms to another for the purpose of assisting the latter to act in a manner inconsistent with its international obligations can thereby escape legal responsibility for complicity in such illegal conduct." (*Ibid.*, p. 551).

aggression or genocide? The answer to this question is not only of theoretical interest; it may be of considerable practical importance, since the consequences which international law attaches to an internationally wrongful act can vary appreciably according to the content of the obligation breached and the characterization of the offence established on this basis. An argument in favour of an affirmative answer could be drawn from the fact that the Definition of Aggression, for example, as we have seen, also treats as an act of aggression the placing by a State of its territory at the disposal of another State, with a view to aggression by the latter against a third State. However, it seems inadmissible to generalize the idea of such equivalence and to extend it beyond cases in which it is specifically provided for in an express provision. Even in such cases, it seems impossible to conclude that the treatment by international law of complicity of any kind in a given act is necessarily the same as its treatment of the act itself. The question can, moreover, only be one of degree, since it depends first and foremost on the extent of the concrete assistance furnished by the accessory to the author of the offence and, hence, on the gravity of the complicity. In any case, it is necessary to guard against the danger of finally diminishing the gravity of a particularly serious internationally wrongful act by unduly enlarging the area in which the existence of such acts is recognized. In conclusion, we consider that as a general rule the fact of participation, in the form of aid or assistance—in short, of complicity—in the commission of a wrongful act by another must remain under international law, as it does under internal law, an act distinct from such participation, which is characterized differently and does not necessarily have the same legal consequences.

76. On the basis of the foregoing considerations it should now be possible to establish the rule of international law which is to regulate the subject-matter examined in this section. After noting the comments and considerations put forward about the various cases in regard to which it was conceptually possible to envisage the idea of “participation”, it seems clearly established that the only real form of “participation” by a State in the commission of an internationally wrongful act by another State is that nor-

mally termed “complicity”. It is therefore specifically to this case that the rule to be established should, in our opinion, refer. We shall take into consideration only the case of complicity of a State in an international offence committed by another State, even though it may well be presumed that the same principles would apply if one of the protagonists were a subject of international law other than a State. It also seems essential to bring out, in the formulation chosen: (a) that in order to become “complicity” in the commission of an internationally wrongful act by another State conduct which consists in giving aid or assistance to another State committing or preparing to commit an international offence must be adopted knowingly and with intent to facilitate the commission of the offence; (b) that the conduct by which the State thus becomes an accessory to the commission by another State of an internationally wrongful act against a third State is characterized as internationally wrongful precisely by reason of participation in an international offence committed by another, and that this is so even if, in other circumstances, such conduct would be internationally lawful; (c) that the internationally wrongful act of the State which becomes an accessory to the international offence of another State must not be confused with this “principal” offence, and that the international responsibility deriving from such an act therefore remains separate from that incurred by the State committing the principal offence, even if that offence was committed with help of facilities granted by the accessory State.

77. In view of the foregoing, we think we can propose the following text to the Commission for adoption:

**Article 25. Complicity of a State in the internationally wrongful act of another State**

**The fact that a State renders assistance to another State by its conduct in order to enable or help that State to commit an international offence against a third State constitutes an internationally wrongful act of the State, which thus becomes an accessory to the commission of the offence and incurs international responsibility thereby, even if the conduct in question would not otherwise be internationally wrongful.**

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**“Force majeure” and “fortuitous event” as circumstances precluding wrongfulness:  
survey of State practice, international judicial decisions and doctrine**

*Study prepared by the Secretariat*

[Original: English]

[27 June 1977]

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#### ABBREVIATIONS

GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
<i>I.C.J. Pleadings</i>	ICJ, <i>Pleadings, Oral Arguments, Documents</i>
<i>I.C.J. Reports</i>	ICJ, <i>Reports of Judgments, Advisory Opinions and Orders</i>
IMCO	Inter-Governmental Maritime Consultative Organization
MEDRI	Mediterranean Route Instructions
OECD	Organisation for Economic Co-operation and Development
OEEC	Organisation for European Economic Co-operation
PCIJ	Permanent Court of International Justice
<i>P.C.I.J., Series A</i>	PCIJ, <i>Collection of Judgments</i>
<i>P.C.I.J., Series A/B</i>	PCIJ, <i>Judgments, Orders and Advisory Opinions</i>
<i>P.C.I.J., Series C</i>	
Nos. 1-19	PCIJ, <i>Acts and Documents relating to Judgments and Advisory Opinions</i> [to 1930]
Nos. 52-88	PCIJ, <i>Pleadings, Oral Statements and Documents</i> [from 1931]
<i>P.C.I.J., Series E</i>	PCIJ, <i>Annual Reports</i>

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#### EXPLANATORY NOTE: ITALICS IN QUOTATIONS

An asterisk inserted in a quotation immediately after a passage in italics indicates that that passage was not in italics in the original text.

## Foreword

1. In order to assist the International Law Commission in its work on the topic of State responsibility, the Codification Division of the Office of Legal Affairs of the United Nations Secretariat has for some time been conducting research, at the request of the Special Rapporteur for the topic, on the various circumstances tentatively selected as circumstances precluding wrongfulness in international law, namely "*force majeure*" and "fortuitous event", "state of emergency" (*état de nécessité*), "self-defence", "legitimate application of a sanction" and "consent of the injured State".<sup>1</sup>

2. The present document describes the research carried out in State practice, international judicial

<sup>1</sup> See *Yearbook ... 1975*, vol. II, p. 57, document A/10010/Rev.1, para. 45.

decisions and doctrine with regard to *force majeure* and fortuitous event. The publication of the outcome of this research has been decided in the light of the progress already made by the Commission in the preparation of its draft articles on State responsibility for internationally wrongful acts and of the fact that in international law literature *force majeure* and fortuitous event would appear to have been dealt with in a rather sparse and non-comprehensive manner, making access to relevant materials and information a cumbersome task.

3. The presentation of material and information in this document does not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning its contents nor on the positions that States may have adopted regarding specific cases referred to therein.

## Introduction

### (a) *Force majeure* in international law

4. *Force majeure* may be viewed as a mere event or occurrence, or as a legal concept. In international relations, as in municipal law relations, the material causes giving rise to events or occurrences termed *force majeure* may vary. *Force majeure* may certainly be due to a natural disaster like an earthquake, but also to situations having their roots in human causes such as a war, a revolution, mob violence etc. Moreover, certain causes that eventually may give rise to *force majeure* may originate from natural as well as from human causes. For instance, a fire may be man-made but also be provoked by a thunderbolt; a situation of absolute economic necessity amounting to *force majeure* may be due to a drought by lack of rain but also to disruption in world commodity markets or mismanagement of the national economy, etc.

5. Events or occurrences amounting to *force majeure* prompted the different systems and branches of municipal law to enact rules defining the rights and duties of their respective legal subjects vis-à-vis such events or occurrences. This reaction of the legal order to *force majeure* occurs also in international law. A series of primary rules of international law is specifically intended to regulate events or occurrences due, wholly or partly, to *force majeure*. For instance, the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space,<sup>2</sup> opened for signature at Washington, London and Moscow on 22 April 1968 provides that if, owing to accident, distress, emergency or unintended landing, the personnel of a spacecraft land in the territory under the jurisdiction of a contracting State, the latter shall immediately take all possible steps to rescue them and render them all necessary assistance (art. 2). The per-

sonnel found in such a territory or on the high seas or in any other place not under the jurisdiction of any State as a result of those circumstances shall also be safely and promptly returned to representatives of the launching authority (art. 4). Another example may be found in the Agreement on Co-operation with regard to Maritime Merchant Shipping, done at Budapest, on 3 December 1971, article 11 of which provides for assistance and facilities to be granted by the authorities of the territorial State to a vessel, its crew, passengers and cargo in distress or which is wrecked, runs aground, is driven ashore or suffers any other damage off the shore of a contracting party.<sup>3</sup>

6. In other cases, international law takes account of *force majeure* to determine the scope of the primary rules concerned.<sup>4</sup> Thus, for instance, article 40 of the 1961 Vienna Convention on Diplomatic Relations<sup>5</sup> refers expressly to *force majeure* in connexion with the determination of the obligations of third States, and article 14 of the 1958 Convention on the Territorial Sea and the Contiguous Zone,<sup>6</sup> in its English version, refers to it in defining the content of the right of innocent passage through the territorial sea. The rule that local remedies must be exhausted before the State incurs international responsibility for injury to an alien also provides a good example in this respect.

<sup>3</sup> *National Legislation and Treaties relating to the Law of the Sea* (United Nations publication, Sales No. E/F.76.V.2), p. 382.

<sup>4</sup> *Force majeure* is sometimes taken into account even to determine the application of instruments embodying primary rules. Article 4 of the International Loadline Convention, signed at London on 5 July 1930, provides an example of that kind (see para. 89 below).

<sup>5</sup> See para. 81 below.

<sup>6</sup> See para. 83 below. The expression "*force majeure*" used in the English version of the article is rendered in the French version by the words "*relâche forcée*" and in the Spanish version by the words "*arribada forzosa*".

<sup>2</sup> United Nations, *Treaty Series*, vol. 672, p. 119.

When a State injures an alien within its jurisdiction, such a rule applies and international responsibility arises for the State concerned, subsequently to its failure to remedy in its own municipal courts the injury sustained by the alien. On the other hand, if the alien has been injured outside the territorial jurisdiction of the State, the latter is generally regarded as incurring international responsibility for its action instantly, namely without the alien having to exhaust local remedies. Matters being so, the question arises: should the rule on exhaustion of local remedies be applied when the physical presence of the alien within the domain of the State is due to distress of weather or other events of *force majeure*? The answer traditionally given to that question has been that, having not voluntarily submitted to the jurisdiction of the offending State, the injured alien may not be required to submit the issue to the municipal courts of the State concerned for determination before the case becomes amenable to an international claim on his behalf.<sup>7</sup>

7. It may, therefore, happen that *force majeure* becomes part and parcel of a primary rule or that it is presupposed by such a rule. It is not, however, in the field of the primary rules that *force majeure* plays its more important role as a legal concept, but rather in connexion with those rules governing responsibility for non-performance of obligations provided for in primary rules. In this latter context, the question of *force majeure* may be studied when the constituent elements of the "internationally wrongful act" are considered.<sup>8</sup> It is obvious that if "subjective fault" (malicious intent or culpable negligence) of the organ of the State is made expressly a condition for establishing the *subjective element* (conduct consisting of an action or omission attributable to the State under international law) or the *objective element* (conduct constituting a breach of a State's international obligation) of the "internationally wrongful act", the question of *force majeure*—a concept which implies the total absence of such "subjective fault" (*culpa*)—is disposed of in the definition of the "internationally wrongful act". When, as happens often today, the definition of the "internationally wrongful act", or of its constituent elements, contains no ex-

press or direct reference to "subjective fault" (*culpa*) of the organ of the State,<sup>9</sup> the question of *force majeure* is not solved, necessarily, by the enumeration of the constituent elements of the "internationally wrongful act" and requires, consequently, to be studied in the context of other rules governing State responsibility.<sup>10</sup>

8. It is for that reason that *force majeure* is, at present, listed by most writers—even by those who continue to underline the relevance of "subjective fault" of the organ concerned—among the circumstances precluding the eventual qualification of an act or omission leading to the non-performance of the obligation as "wrongful"<sup>11</sup> or exonerating the obligor from responsibility for non-performance of the obligation in question. If it is viewed as a circumstance precluding wrongfulness, *force majeure* has the effect of preventing a given conduct from being qualified as an "internationally wrongful act"; if it is considered as a circumstance exonerating the obligor from responsibility, *force majeure* would free the obligor from the consequences normally attached to an "internationally wrongful act". In both cases, *force majeure* appears as a "justification" (*fait justificatif*) of non-performance of obligations.<sup>12</sup> Taking procedurally the form of a "defence" or "exception" against a claim for non-performance, such a justifi-

<sup>9</sup> See article 3 of the draft articles on State responsibility (*Yearbook ... 1977*, vol. II (Part Two), pp. 9 *et seq.*, document A/32/10, chap. II, sect. B.1).

<sup>10</sup> The following statement is not without interest in this respect:

"Recorded cases in this connexion seem rather to refer to fortuitous event or to *force majeure* as the absolute limits to the obligation to make reparation. While it is certain that such cases constitute a limit to the existence of such an obligation, here, as can clearly be seen, it is the very existence of voluntary conduct on the part of a person which is lacking. It does not appear possible to deduce from this that such rules indicate the limit of fault and that recognition of their relevance signifies that fault itself must be present. These are in fact largely undefined concepts which can serve a very different purpose, depending on the context in which they are used. Since in international practice it is not possible to find a self-contained formulation, the reply to the question concerning the nature of the obligation to make reparation, in the cases where it arises, cannot be made dependent on their relevance. On the contrary, the concepts of fortuitous event and *force majeure* will take on different meanings, depending on whether it is admitted that such an obligation arises independently of fault ..." (R. Luzzatto, "Responsabilità e colpa in diritto internazionale", *Rivista di diritto internazionale* (Milan), vol. 51, No. 1 (1968), pp. 93-94.)

<sup>11</sup> For example, A. Favre, in "Fault as an element of the illicit act.", *Georgetown Law Journal* (Washington, D.C.), vol. 52, No. 3 (spring, 1964), pp. 566-567, states the following:

"... There are circumstances which can make performance of an obligor's duty impossible without the fault of the obligor. Their effect, according to general legal principles, is to exonerate him, except in cases where the law imposes upon him an obligation to redress the injury which occurred without his fault. The *act of God* consists of an event—normally a natural phenomenon—which is unforeseeable and irresistible, and is in no way the result of the obligor's acts ... In all of the above situations where an infringement of the rights of a State results from the state of necessity, an act of God, a reprisal, self-protection, or self-defence, although there may be an obligation to compensate the injury caused, there is no fault, and thus no illicitness".

<sup>12</sup> See, for instance P. Reuter, *Droit international public*, 4th ed. (Paris, Presses universitaires de France, coll. Thémis, 1973), p. 115.

<sup>7</sup> For an explanation according to which the voluntary or involuntary presence of the injured alien within the State jurisdiction is a matter of indifference so long as the issue is not one of excess of jurisdiction but of legal characterization of the harm, see D. P. O'Connell, *International Law*, 2nd ed., vol. II (London, Stevens, 1970), pp. 950-951.

<sup>8</sup> Thus, for example, R. Ago, in "Le délit international", *Recueil des cours de l'académie de droit international de la Haye, 1939-II* (Paris, Sirey, 1947), vol. 68, p. 419, considering that "a fault *latu sensu* on the part of the organ whose conduct has injured an alien subjective right is in any circumstances a necessary condition for establishing the commission of an internationally wrongful act" (*ibid.*, p. 498), examines the question of *force majeure* in the chapter devoted to the *subjective element* of the "internationally wrongful act" (*ibid.* pp. 450-498). In the chapter dealing with the circumstances precluding "wrongfulness", the writer examines only "consent of the injured State", "legitimate application of a sanction", "self-defence" and "state of emergency" (*ibid.*, pp. 532-545).

cation is termed, frequently, the "defence of *force majeure*" or the "exception of *force majeure*".

9. The "defence" or "exception" of *force majeure* operates as a "justification" in municipal law, as well as in international law. The Permanent Court of Arbitration, in its judgement of 11 November 1912 concerning the *Russian Indemnity case*, recognized that "the exception of *force majeure* ... may be raised in public international law"<sup>13</sup> and the defence or exception of *force majeure* is frequently referred to as a "general principle of law". Thus, it has been said that "it is a general principle of law that an obligor who is placed by an event of *force majeure* in a situation in which performance of the obligation is impossible is thereby exonerated from all responsibility"<sup>14</sup> and that "under general principles of law recognized in all countries, there is no responsibility if a damage ensues independently of the will of the State agent and as a result of *force majeure*".<sup>15</sup>

### (b) Terminological questions

10. As indicated above, *force majeure*, as a broad concept, has been received in the various municipal law systems (civil law system, common law system, etc.) as well as in the various law branches into which those systems may be divided (private law, administrative law, criminal law, etc.). The definition, scope and *modus operandi* of the exception of *force majeure* vary, however, from a given municipal system or branch of law to another, as does the use of the expression "*force majeure*" itself. The expression "*force majeure*" (*vis major* in Roman law) is more akin to civil law systems, within which it is generally used. Authors belonging to those countries did not have, therefore, any problem in borrowing the expression from their respective municipal law (in French: *force majeure*; in Spanish: *fuera mayor*; in Italian: *forza maggiore*; etc.). Terminological dictionaries of Latin languages relating to international law record also the expression as an accepted term of art.<sup>16</sup> Other languages, for instance, Russian (*nepreodolimaya sila*)<sup>17</sup> and German (*höhere*

*Gewalt*)<sup>18</sup> have also coined corresponding expressions, although the French expression *force majeure* is also sometimes used by Russian and German writers.

11. The situation presents itself somewhat differently in countries belonging to the common law system. The common law expression *act of God* does not seem equivalent to *force majeure*. It refers exclusively to an unusual or extraordinary occurrence due to "natural causes" without human intervention, while *force majeure* covers human as well as natural causes.<sup>19</sup> Common law judges experience a certain uneasiness when they are called upon to interpret, within their legal system, the expression "*force majeure*". Passages like the following are typical in this respect:

The words "*force majeure*" are not words which we [have] generally found in an English contract. They are taken from the *code Napoléon* ... In my construction of the words "*force majeure*", I am influenced to some extent by the fact that they were inserted by this foreign gentleman ... At the same time, I cannot accept the argument that the words are interchangeable with "*vis major*" or "act of God". I am not going to attempt to give any definition of the words "*force majeure*", but I am satisfied that I ought to give them a more extensive meaning than "act of God" or "*vis major*" ...<sup>20</sup>

This does not mean, however, that "*force majeure*" is completely unusual as a term of art in common law countries and, still less, that that system overlooks occurrences or events falling under the exception of *force majeure*. In addition to "act of God" and "*vis major*", expressions such as "overwhelming force", "irresistible force", "superior force", etc., may be found in the English language legal dictionaries.<sup>21</sup> This situation explains, however, the terminological hesitation which may be observed in the international law practice and doctrine of Anglo-Saxon countries. The terms "act of God" and "*vis major*" appeared often, in the past, in diplomatic correspondence and other State papers of those countries, as well as in doctrinal writings of Anglo-Saxon authors.

agree that 'irresistible force' includes both natural and social phenomena; it is not an 'act of God', but something unusual, exceptional, which the harm-doer could not have prevented except at quite unreasonable economic cost" (quoted from J. M. Kelson, "State responsibility and the abnormally dangerous activity", *Harvard International Law Journal* (Cambridge, Mass., spring 1972), vol. 13, No. 2, p. 208, foot-note 59).

<sup>18</sup> See, for instance, E. Weinhold, *Fachwörterbuch für Rechtspflege und Verwaltung* (Baden-Baden, Régie autonome des publications officielles, 1949).

<sup>19</sup> See para. 4 above. J. Fleming says: "Act of God' is a term as destitute of theological meaning as it is inept for legal purposes. It signifies the operation of natural forces, free from human intervention" (*The Law of Torts*, 4th ed. (Sidney, Law Book Company, 1971) p. 291).

<sup>20</sup> *Matsoukis v. Priestman and Co.* (1915) (United Kingdom, *The Law Reports, King's Bench Division of the High Court of Justice* (London, Incorporated Council of Law Reporting for England and Wales, 1915), vol. I, pp. 685 and 686, per Bailhache, J. (passage reproduced in J. B. Saunders, *Words and Phrases Legally Defined*, 2nd ed. (London, Butterworth, 1969), vol. 2, p. 268).

<sup>21</sup> See, for instance, W. Mack, W. B. Hale and D. J. Kiser, *Corpus Juris, being a Complete and Systematic Statement of the Whole Body of the Law as Embodied in and Developed by all Reported Decisions* (London, Butterworth, 1921); H. Campbell Black, *Black's Law Dictionary*, 4th ed. (St. Paul, Minn. West, 1968).

<sup>13</sup> See para. 394 below.

<sup>14</sup> J. Basdevant, "Règles générales du droit de la paix", *Recueil des cours...*, 1936, IV (Paris, Sirey, 1937), vol. 58, p. 555.

<sup>15</sup> E. Jiménez de Aréchaga, "International responsibility", *Manual of Public International Law*, ed. M. Sørensen (London, Macmillan, 1968), p. 544.

<sup>16</sup> For instance, the *Dictionnaire de la terminologie du droit international* published under the auspices of the Union académique internationale (Paris, Sirey, 1960) defines, on page 290, *force majeure* as an "obstacle that cannot be overcome, resulting from external circumstances preventing the performance of an obligation or compliance with a rule of international law".

<sup>17</sup> In the Soviet civil law system *force majeure* (*nepreodolimaya sila*) is defined as an extraordinary event, the harmful effects of which could not be averted by any means at the disposition of the party whose performance is afflicted by *force majeure*. Soviet criminal law does not mention *force majeure* as a defence, but the concept is borrowed from civil law and accepted by the courts. (*Encyclopedia of Soviet Law*, ed. F. J. M. Feldbrugge (Dobbs Ferry, N.Y. Oceana, 1973), vol. 1, pp. 278-279). "Soviet writers

Although it cannot be said that the use of such terms has disappeared, the French expression "*force majeure*" would seem to be today the most frequently used in the English terminology of international law to convey the meaning attached to the concept of *force majeure*. Such a usage has also been accepted in the English texts of contemporary international conventions and treaties, including codification conventions concluded on the basis of drafts prepared by the International Law Commission. Used likewise by the Commission in the chapter on State responsibility included in the report on the work of its twenty-seventh session,<sup>22</sup> the French expression "*force majeure*" will be utilized throughout the English version of the present paper.

12. The use of the expression "fortuitous event" (in French: *cas fortuit*; in Spanish and Italian: *caso fortuito*; in Russian: *sluchai*; in German: *Zufall*) does not appear to present any major terminological problem in international law. Those who distinguish between "*force majeure*" and "fortuitous event" use the latter expression in municipal law, as well as in international law.

### (c) The concept of *force majeure*

13. "*Force majeure*" has been defined, *lato sensu*,<sup>23</sup> as an unforeseen or foreseen but inevitable or irresistible event external to the obligor which makes it impossible for him to perform the obligation concerned. Underlining the close interconnexion that *force majeure* bears to the degree of diligence an obligor is expected to exercise in each specific legal relationship, *force majeure* has also been defined in a negative or separative way as an occurrence which is not attributable to any "fault" (*dolus* or culpable negligence) on the part of the obligor, or which takes place independently of the obligor's will and in a manner uncontrollable by him, which makes it impossible to perform the obligation.<sup>24</sup> Ultimately, the "exception of *force majeure*" is based on the principle that possibility is the limit of all obligation (*ad impossibilia nemo tenetur*). No one is expected to perform the impossible. Consequently, the "exception of *force majeure*" operates so long as *force majeure* itself exists. If *force majeure* disappears, the obligor must fulfil the obligation, otherwise he will incur responsibility for non-performance.

14. It should be noted that the impossibility of performance created by certain events or occurrences

may be not only "temporary" but also "permanent", as well as "absolute" or "relative".<sup>25</sup> For the characterization of the event or occurrence as *force majeure*, the distinctions between "temporary" and "permanent" impossibility would seem irrelevant. This is, however, not necessarily so from the standpoint of the effects attached by the legal order to those forms of impossibility. Thus, for instance, an impossibility resulting from "permanent disappearance or destruction of an object indispensable for the execution of a treaty" due to an event or occurrence of *force majeure*, provides a ground not only for invoking the "exception of *force majeure*" against a claim for non-performance but also a ground for terminating the treaty or withdrawing from it.<sup>26</sup> However, if the impossibility is "temporary", execution can only be suspended. So far as the distinction between "relative" and "absolute" impossibility is concerned, the event or occurrence in question could eventually be viewed as an attenuating circumstance in cases where the impossibility is only "relative".<sup>27</sup>

15. It is generally recognized that for an "exception of *force majeure*" to be well-founded the following requirements should be met: (1) the event must be beyond the control of the obligor and not self-induced; (2) the event must be unforeseen or foreseen but inevitable or irresistible; (3) the event must make it impossible for the obligor to perform his obligation; (4) a causal effective connexion must exist between the event of *force majeure*, on the one hand, and the failure to fulfil the obligation, on the other. The first of those requirements does not mean, however, that an event or occurrence constituting *force majeure* must be absolutely external to the person and the activities of the obligor. The essential element in a *force majeure* event is not whether the acts or omissions involved are those of the obligor or external to him but rather the fact that such acts or omissions cannot be attributed to him as a result of his own wilful behaviour. Concerning the second requirement, namely the unforeseen or foreseen but inevitable or irresistible event, it should be stressed that it is sufficient if either of these two conditions is

<sup>22</sup> See *Yearbook ... 1975*, vol. II, pp. 56, 57 and 59, document A/10010/Rev.1, paras. 45 and 51.

<sup>23</sup> For the distinction between "*force majeure*" (*stricto sensu*) and "fortuitous event", see paras. 17-19 below.

<sup>24</sup> "*Force majeure*, in the sense of an unavoidable natural event, blameless chance or blameless error on the part of the organ concerned, precludes a finding of unlawfulness in its conduct and thus precludes international responsibility on the part of the subject of international law answerable for that conduct." (F. A. Freiherr von der Heydte, *Völkerrecht—Ein Lehrbuch* (Cologne, Verlag für Politik und Wirtschaft, 1958), vol. I, p. 314.

<sup>25</sup> Some writers would seem, however, to view *force majeure* mainly as a "temporary" impossibility. For instance, it has been said: "Whereas *force majeure* relates to a cause that is most commonly temporary, the rule *impossibilia nulla est obligatio* refers to an impossibility that is absolute and permanent" (G. Ténékidès, "Responsabilité internationale", *Répertoire de droit international* (Paris, Dalloz, 1969), vol. II, p. 785). For an analysis of the manner in which international courts and tribunals have coped with pleas of absolute and relative impossibility of performance of conventional obligations, see G. Schwarzenberger, *International Law*, 3rd ed. (London, Stevens, 1957), vol. I, pp. 538-543.

<sup>26</sup> See paras. 76-80 below.

<sup>27</sup> See, for instance, para. 4 of article 17 of the "Revised draft on responsibility of the State for injuries caused in its territory to the person or property of aliens", submitted in 1961 by F. V. Garcia Amador to the International Law Commission, stating that certain circumstances, including *force majeure*, "if not admissible as grounds for exoneration from responsibility, shall operate as extenuating circumstances ..." (*Yearbook ... 1961*, vol. II, p. 48, document A/CN.4/134 and Add.1, addendum).

met. So far as the third requirement is concerned, it should be pointed out that mere difficulty in performing an obligation is not deemed to constitute *force majeure*. At the same time, the thesis that, disregarding impossibility due exclusively to the conditions of the obligor concerned as such, proclaims that impossibility of performance must be, in all cases, absolute and objective would appear to go too far, in particular if it is accepted as an *a priori* postulate of general application. Lastly, with respect to the fourth requirement, it must be said that the causal connexion referred to should not be the result of behaviour wilfully adopted by the obligor.

16. The above defining features of the "exception of *force majeure*" are underlined not only by private law writers but also by international law specialists. Among the latter, statements such as the following may be found:

In order to exonerate a State from its responsibility, *force majeure* must possess the three traditional characteristics stated in all legal systems: it must be irresistible, it must be unforeseeable, and it must be external to the party invoking it;<sup>28</sup>

and

The application of the principle of *vis major* is, however, subject to two important qualifications. First, there must be a link of causality between the *vis major* and the failure to fulfil the obligation. Secondly, the alleged *vis major* must not be self-induced.<sup>29</sup>

Doctrine makes it clear, however, that some of those requirements present particular problems and difficulties in international law. For instance, the condition that *force majeure* must be an event external to the obligor cannot always easily be established in international relations, because, as has been said, "the more extensive the community invoking it, the more the external factors are narrowed".<sup>30</sup>

#### (d) The differentiation between "*force majeure*" (*stricto sensu*) and "fortuitous event"

17. The question whether or not the terms *force majeure* and "fortuitous event" are synonymous has been discussed by authors for centuries. The prevailing opinion among the specialists in Roman law would seem to be that the difference between "*force majeure*" (*vis major*) and "fortuitous event" (*casus*)

resides in the fact that circumstances of *force majeure* are not only unforeseeable but also inevitable or irresistible (*vis cui resistit non potest*). There is no human force that can be opposed to those circumstances.

18. Among civil law specialists—and with reference to modern codes which sometimes use in certain articles the term *force majeure* and in others the term "fortuitous event" or which even use both terms in the same article—one school of thought holds that the distinction is no longer operative or is of no interest in modern law, while another maintains that the distinction still exists. Within the latter school, a further division could be made on the basis of the distinguishing criteria used. One theory, termed "subjective", which is quite close to that held by the specialists in Roman law referred to above, takes into account the criteria of unforeseeability and inevitability. A "fortuitous event", according to that theory, is an event which could not be foreseen but which, if foreseen, could have been avoided, while *force majeure* is an event which, even if it had been foreseen, would have been inevitable. A second theory, termed "objective", is concerned with the internal or external origin of the impediment to the performance of the obligation. According to this theory, a "fortuitous event" is an event which takes place inside the circle of those affected by the obligation, while *force majeure* is an event that takes place outside such a circle and is accompanied by such overwhelming violence that, objectively considered, cannot be viewed as one of those fortuitous occurrences which may be expected in the ordinary and normal course of everyday life.

19. In international law practice and doctrine the term *force majeure* is normally used *lato sensu*, namely, covering *force majeure (stricto sensu)* as well as "fortuitous event". Examples may be found, however, in State practice, as well as in international judicial decisions and proceedings, in which an express reference is made to "fortuitous event" or in which "fortuitous event" is distinguished from other cases of *force majeure*. Some authors raise the question whether it is possible to distinguish in international law between *force majeure* and "fortuitous event".<sup>31</sup> Others use both terms. Among them, those who refer to the criteria according to which *force majeure (stricto sensu)* should be differentiated from "fortuitous event" associate "inevitability" or "irresistibility" with *force majeure* and "unforeseeability" with "fortuitous event".<sup>32</sup> They do not draw, however, from such a differentiation, different legal conclusions as to the characterization of both *force*

<sup>28</sup> Reuter, *op. cit.*, p. 181.

<sup>29</sup> B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953), p. 228. The writer quotes some passages of international judicial proceedings and decisions in support of his statement. With regard to the causality requirement, he mentions certain conclusions of the Permanent Court of International Justice in the 1929 cases of the *Serbian Loans* and the *Brazilian Loans*, and of the rapporteur in the 1923 *Spanish Zone of Morocco Claims* (1924–1925) (see paras. 263–273 and 412–420 below). So far as the requirement that *force majeure* must not be self-induced is concerned, reference is made by the writer to the Florida (Ex-Oreto) case in the 1872 *Alabama Arbitration*, to the Norwegian Shipowners Claims case considered in 1922 by the Permanent Court of Arbitration (see paras. 406–408 below) and to the Michel Macri case handled in 1928 by a Rumanian-Turkish arbitral tribunal (Cheng, *op. cit.*, paras. 227–231).

<sup>30</sup> Reuter, *op. cit.*, para. 181. The author refers in this connexion to cases of alleged *force majeure* due to financial difficulties or difficulties relating to international exchanges.

<sup>31</sup> See, for instance, L. Cavare, *Le droit international public positif*, 3rd ed. (Paris, Pedone, 1969), vol. II, p. 499.

<sup>32</sup> For example, R. Ago, in "La colpa nell'illecito internazionale", *Scritti giuridici in onore de Santi Romano* (Padua, CEDAM, 1940), vol. 3, says, on p. 190, that "the negative limit of fault is determined either by the fact that the conduct in question was not voluntary or by the fact that the result of the injury was not absolutely predictable; in other words, to use the common terms, by *force majeure* or fortuitous event".



*majeure* (*stricto sensu*) and "fortuitous event" as circumstances precluding "wrongfulness" or providing exoneration from responsibility in the field of State responsibility for internationally wrongful acts.

(e) **The distinction between the concept of "force majeure" and the concept of "state of emergency (*état de nécessité*)"**

20. The concept of state of emergency (*état de nécessité*) and the problem of its acceptance in international law as a circumstance precluding "wrongfulness"—a question of considerable controversy among authors—is not examined in the present paper, which is exclusively devoted to *force majeure*. It would appear necessary, however, to include in this introduction certain general considerations on the matter, for the purpose of clarifying somewhat the distinction between both concepts as two different kinds of circumstances precluding "wrongfulness" and, by way of consequence, the concept of *force majeure* itself. It is particularly important to do so, because the development in international law of a common doctrinal position on that distinction has not been facilitated,<sup>33</sup> as a result of certain "aprioristic" theoretical views and some concrete examples belonging to the history of international relations in the nineteenth and twentieth centuries.<sup>34</sup>

21. Some international law writers refer to both "*force majeure*" and "state of emergency (*état de nécessité*)" as two different circumstances. Others, however, use exclusively "*force majeure*" or "state of emergency (*état de nécessité*)". Divergencies among authors on the use of those terms are to some extent linked to the doctrinal debate between those who emphasize the need to take into account the "fault" element and those who approach the matter from the standpoint of an objective notion of international responsibility which excludes any idea of "subjective fault".<sup>35</sup> It would seem that those belonging to the first group refer more often to "*force majeure*", while writers in the second group are more inclined to speak of "state of emergency (*état de nécessité*)".

<sup>33</sup> In *Théories et réalités en droit international public* (Paris, Pedone, 1960), 3rd ed., p. 338, C. de Visscher, for example, indicates that "state of emergency" (*nécessité*) tends to merge either into *force majeure* or into self-defence.

<sup>34</sup> For instance, the incorporation of Krakow in 1846. Germany invoked *état de nécessité* to justify the violation of the neutrality of Belgium during the First World War, a position supported at that time by certain German writers and, in particular, by J. Kohler. For a rejection in international law of the justification of *état de nécessité* see, for example, C. de Visscher, "Les lois de la guerre et la théorie de la nécessité". *Revue générale de droit international public* (Paris), vol. XXIV, No. 1, January–March 1917, pp. 74 et seq.; "La responsabilité des Etats". *Bibliotheca Visseriana* (Leyden, Brill, 1924), vol. II, pp. 111 et seq.; and *Théories et réalités en droit international public*, 4th ed. (Paris, Pedone, 1970), pp. 314–316. Most French writers in international law prefer also to rely on the concept of *force majeure* rather than on *état de nécessité*. *Etat de nécessité* (or "state of emergency") is more often referred to by German, Italian and Anglo-Saxon writers.

<sup>35</sup> As has been said, "... acceptance of the principle of objective responsibility would tend to limit the relevance of the defence of *force majeure* to the issues of the voluntary character and imputability of tortiously relevant behaviour. Conversely, the principle of

This observable tendency was more acute before the Second World War than today. Moreover, there is a considerable number of writers who do not fit into that kind of categorization. Actually, it would seem that the roots of the divergence are somewhat deeper and relate, ultimately, to the explanations given by the different schools of thought regarding the very nature of international law and the process of the creation of its rules.<sup>36</sup>

22. The hesitations of authors on the matter go further than a mere question of use of terms. To a certain extent, they have infringed on the very concepts of *force majeure* and state of emergency (*état de nécessité*) in international law as circumstances precluding wrongfulness or involving exoneration from responsibility. What actually happened is that, confronted with international practice, some of those who favour "*force majeure*" try to cover under that term cases of state of emergency, and some of those who use the expression "state of emergency" include therein cases of *force majeure*. In the process—and it could not have been otherwise—the conceptual distinction between *force majeure* and state of emergency became, in many instances, somewhat blurred. A certain lack of precision in wording in relevant case law, State practice and international judicial decisions has also not helped doctrine to make that conceptual distinction clearer.<sup>37</sup>

subjective responsibility in the shape of the *culpa*-doctrine would widen the scope of this defence. It would tend to defeat any reproach of blameworthiness, and thus deprive unlawful behaviour in circumstances of *force majeure* of its tortious character." (Schwarzenberger, *op. cit.*, p. 643.) However, the same writer, who refers to "necessity" and "*force majeure*" as "two defences" considers that, in the absence of a clear rule to the contrary, the objective view of international responsibility would rule out likewise the defence of necessity. In his view, if "blameworthiness were the test of tortious behaviour, it would be possible to dispense with rules governing necessity. A state of necessity would be merely a factual set of circumstances which might amount to a justification of, or excuse for, a breach of international law." (*Ibid.*, pp. 641 and 643.)

<sup>36</sup> The following passage is particularly relevant in that respect:

"*Force majeure* can only be accepted by doctrines which take into consideration the state of mind of the agent. The will of the State is expressed by individuals acting in its name. These individuals are subject to states of mind which can be influenced. This subjective aspect of responsibility can thus be fitted into the theory of *force majeure*. In contrast, in positivist and voluntarist theories, there is no place for the notion of *force majeure*. Indeed, the obligations of the State are the product of its own will. The State assumes obligations only to the extent that it believes itself able to do so and within the limits it has determined. This being so, how can one speak of an external force capable of constraining the State? In these theories, all subjective considerations, the state of mind and the will of the agent, are ignored and only the objective element constituted by the actual violation of the law is considered. The situation of an individual in municipal societies is completely different. He is subject to the authority of legal regulations which do not originate in his own will. The will of the individual may therefore yield to an order that dominates him. It is conceivable that an external force may cause him to act otherwise than he had foreseen. In positivist and voluntarist theories, in contrast, only the state of emergency can be accommodated, and even so it will be conceived otherwise than in private law." (Cavaré, *op. cit.* pp. 498 and 499.)

<sup>37</sup> Thus, the Permanent Court of Arbitration in its (award on the *Russian Indemnity case* (1912)—in which it recognized that in-

23. A few examples will serve to illustrate the considerations contained in the preceding paragraph. For instance, it has been said that "the very writers who deny that the notion of *force majeure* can be applied in international law agree that a threatened State has the right of self-preservation (Selbsterhaltung). They recognize the same idea and simply circumscribe it more narrowly ...".<sup>38</sup> There are also writers who refer, as a circumstance precluding "wrongfulness", to "self-preservation in emergencies" if the action is necessary to avert an impending injury to the interests of the State and who, at the same time, consider that the exercise of what is termed the "right to self-preservation" applies, *inter alia*, to dangers following from the laws of nature without the interference of man.<sup>39</sup> Among writers who reject the theory that "state of emergency" is based on any right of "self-preservation"—as well as theories which conceive "state of emergency" as a situation whose evaluation is reserved exclusively to the State which acts—examples may likewise be found in which "state of emergency" and *force majeure* are referred to as if they were one and the same notion.<sup>40</sup>

24. With respect to those who prefer to speak of *force majeure* rather than of "state of emergency", the following passage, frequently quoted, is particularly significant:

But it may be asked whether what Mr. Anzilotti has in mind when he speaks of the defence of the state of emergency is not in fact the exception of *force majeure*. If this is the case, is it not preferable to rely only on the latter as corresponding to a general notion of law that is better established and less likely to open the door to exaggerated claims than the concept of emergency? ...

Mr. Anzilotti certainly spoke on that occasion [separate opinion in the *Oscar Chinn Case* (1934)<sup>41</sup>] of a state of emergency and characterized it by the impossibility of acting otherwise than in a manner contrary to law. This is completely consistent with the notion of *force majeure* which appears in the decision of the Permanent Court of Arbitration [*Russian Indemnity case* (1912)<sup>42</sup>]. The same writer views the concept of *force majeure* reflected in the decision of the Permanent Court of

(Foot-note 37 continued.)

international law allows the "exception of *force majeure*"—rejected in that case that exception, advanced by the Ottoman Empire, because, in the words of the Court, the payment of the sum due to Russia would not have "imperilled the existence of the Ottoman Empire or gravely jeopardized its internal or external situation" (see para. 394 below). [Translation by the Secretariat.] These words could be understood as conveying a notion more akin to the concept of state of emergency than to the concept of *force majeure*.

<sup>38</sup> F. von Liszt, *Le droit international: Exposé systématique*, trans. into French by G. Gidel from the 9th German ed. (1913) (Paris, Pedone, 1927), pp. 201–202.

<sup>39</sup> For example, A. Ross, *A Textbook of International Law (General Part)* (London, Longmans, Green, 1947), pp. 247 and 248.

<sup>40</sup> For instance, A. P. Sereni refers to an "act committed in a state of emergency (*force majeure*)" (*Diritto Internazionale* (Milan, Giuffrè, 1962), vol. III, p. 1528). The writer defines "state of emergency" as follows: "An act contrary to law which is committed by a person driven by necessity to save himself from a grave and imminent danger to which he has not voluntarily given cause is considered to be an act committed in a state of emergency" (*ibid.*, pp. 1528 and 1529).

<sup>41</sup> *P.C.I.J.*, Series A/B 63, p. 114.

<sup>42</sup> J. Basdevant, *loc. cit.*, pp. 555–556

Arbitration as "a basic formulation of what is to be understood by *force majeure*".<sup>43</sup>

25. There are certain objective reasons for explaining such doctrinal views as the one referred to above. It must be recognized that as a result of the specific content of certain rules of international law<sup>44</sup> and the emphasis placed in international practice on the circumstances of each particular case, the generic structure of concepts such as *force majeure* and "state of emergency", originally fashioned in the environment of municipal law, tends to become somewhat blurred. This is particularly so because, ultimately, both concepts share in common, in a certain way, the idea of "necessity".<sup>45</sup> In both cases, the alleged impossibility of performing the obligation concerned is presented as a "necessary" conduct. The two concepts, however, do not refer to the same kind of "necessity". On the contrary, "necessity" in cases of *force majeure* differs in certain important aspects from the "necessity" involved in cases of "state of emergency". One of those aspects, perhaps the most essential, relates to the difference between the notions of "necessary act" and "voluntary act". Cases of *force majeure* tend to create conditions in which the conduct adopted is not only "necessary" but also "involuntary", while, as has been said, contravention of the law in an emergency amounting to necessity "always means an intentional act or omission of the tortfeasor".<sup>46</sup> Anzilotti himself in his *Corso* begins his study of the concept of "state of emergency (*état de nécessité*)" by pointing out that "the very way in which the problem is stated demonstrates that it excludes ... cases in which the non-performance of an obligation results from a genuine impossibility".<sup>47</sup>

<sup>43</sup> *Ibid.*, p. 555, foot-note 3.

<sup>44</sup> Primary rules of international law often make allowance for varying degrees of necessity, a point underlined by authors. See, for example, E. Jiménez de Aréchaga, *loc. cit.*, p. 543, and I. Brownlie, *Principles of Public International Law*, 2nd ed. (Oxford, Clarendon Press, 1973), p. 452. Moreover, they may combine, as happens sometimes with conventional rules, *force majeure* with "state of emergency". Furthermore, in conventional language *force majeure* (*stricto sensu*) is often distinguished from "fortuitous event" and the word "emergency", or "emergencies", is used to refer to the latter. Such kinds of "emergency" or "emergencies" do not fall properly under the concept of "state of emergency" but rather under *force majeure* (*lato sensu*). See, for example, article V of the Treaty on Principles Governing the Activities of States in the Exploration and Uses of Outer Space, including the Moon and Other Celestial Bodies (United Nations, *Treaty Series*, vol. 610, p. 205) and articles 2 and 4 of the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (*ibid.*, vol. 672, p. 119). For a commentary thereon, see F. Durante, *Responsabilità internazionale e attività cosmiche* (Padua, CEDAM, 1969), pp. 78–79.

<sup>45</sup> "The notion of emergency (*nécessité*) is also the foundation in maritime law of the right of *relâche forcée*, the right of warships and merchant vessels alike, when so compelled by the hazards of the sea, to enter and to remain in a port, access to which is in principle prohibited to them" (Von Liszt, *op. cit.*, p. 202).

<sup>46</sup> Schwarzenberger, *op. cit.*, p. 642.

<sup>47</sup> D. Anzilotti, *Cours de droit international*, trans. into French by G. Gidel from the 3rd Italian ed. (Paris, Sirey, 1929), vol. I, pp. 507–508.

26. The need to distinguish in international law between the concept of *force majeure* and the concept of "state of emergency (*état de nécessité*)" is more and more underlined in contemporary doctrine, in which statements such as the following may be found:

It is necessary to distinguish the doctrine of necessity from *force majeure*. In case of the former, the unlawful conduct of the State results from a voluntary decision taken as the only way to protect a threatened vital interest. *Force majeure*, on the other hand, is an external and irresistible force which operates independently of the will of the agent, for as Article 19 of the United Nations Charter<sup>48</sup> says, the violation "is due to conditions beyond the control" of the State;<sup>49</sup>

and

It is essential to distinguish carefully between *force majeure* and "state of emergency", which may, according to certain writers, justify the commission of internationally unlawful acts.<sup>50</sup>

Such a distinction is made frequently today not only by writers who reject "state of emergency (*état de nécessité*)" as a general circumstance precluding "wrongfulness" but also by authors who recognize both *force majeure* and "state of emergency" as limits to State responsibility for internationally wrongful acts.<sup>51</sup>

27. As has been said, the essence of the concept of "state of emergency (*état de nécessité*)" "consists in the injury of a subjective right of another party committed by a subject who is compelled thereto by the absolute necessity of preserving himself or others from a grave and imminent danger".<sup>52</sup> The minimum conditions for the existence of "state of emergency (*état de nécessité*)" singled out by many who recognize it as a circumstance precluding "wrongfulness" in international law, appear to be the following: (1) a danger for the very existence of the State (and not for its particular interests, whatever the importance of such interests may be); (2) a danger which has not been created by the State which acts; (3) a danger so grave and imminent that it cannot be avoided by any other means.<sup>53</sup> It should, however, be mentioned in addition that the emergency (*état de nécessité*) is also sometimes offered as justification in cases of

grave and imminent danger to the organ which acts, rather than to the State itself.

28. The possibility of a danger to the very existence of the State, to its vital interests, is frequently underlined by doctrine. Thus, it has been said, that *jus necessitatis* is recognized in international law to the extent that "if there is absolutely no conceivable manner in which a State can fulfil an international obligation without endangering its very existence, that State is justified in disregarding its obligations, in order to preserve its existence".<sup>54</sup> This idea is developed even further in certain definitions like the following: We define a state of emergency, eliminating any international offence in this case, as an objectively ascertainable situation in which a State is threatened by a great danger, present or imminent, which is likely to jeopardize its existence, its territorial or personal status, its government or form of government and to limit or even destroy its independence or capacity to act and from which it can escape only by violating certain interests of other States protected by the law of nations.<sup>55</sup> Nothing of that kind is, in general, referred to by doctrine with respect to the concept of *force majeure*.<sup>56</sup> This is, however, irrelevant as a distinguishing criterion in cases where "emergency" or "necessity" is invoked as a justification of conduct adopted because of a grave and imminent danger to the organ which acts.

29. Like *force majeure*, "state of emergency (*état de nécessité*)" cannot be self-induced. However, in a case of *force majeure* the State concerned is confronted with an external event or occurrence, while cases of "state of emergency" relate to a mere "danger". The motivation behind the conduct adopted by the State concerned is not therefore the same in both hypotheses. In the hypothesis of "state of emergency" the State which invokes that circumstance tries, in a certain way, to enhance its position and to promote its national interests (*de lucro captando*); on the other hand, to protect a position already established (*de damno evitando*) is the main purpose of an exception of *force majeure*.<sup>57</sup> Averting an impending injury, a "danger", rather than reacting to an actual event appears to be a condition of the existence of a "state of emergency"; this does not necessarily correspond to the situation in cases of *force majeure*. It gives to conduct adopted under circumstances of "state of emergency" a certain preven-

<sup>48</sup> Article 19 reads as follows:

"A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member."

<sup>49</sup> E. Jiménez de Aréchaga, *loc. cit.*, p. 544.

<sup>50</sup> G. Ténékidès, *loc. cit.*, p. 786.

<sup>51</sup> For instance, R. Ago, "Le délit international", *loc. cit.*, pp. 476-598 and pp. 540-545; Cheng, *op. cit.*, pp. 69-77 and 226-232; and Schwarzenberger, *op. cit.*, pp. 641-642.

<sup>52</sup> R. Ago, "Le délit international", *loc. cit.*, p. 540.

<sup>53</sup> See, for example, D. Anzilotti, *op. cit.*, pp. 513-514, and R. Ago, "Le délit international", *loc. cit.*, p. 545. Writers who consider state of emergency together with *force majeure* add sometimes, as an additional condition, that the danger must be unforeseeable (for instance, Sereni, *op. cit.*, p. 1530).

<sup>54</sup> Cheng, *op. cit.*, p. 228.

<sup>55</sup> K. Strupp, "les règles générales du droit de la paix", *Recueil des cours ... 1934-I* (Paris, Sirey, 1934), vol. 47, p. 568.

<sup>56</sup> See paras. 10-13 above. It should be noted, however, that writers who reject "state of emergency" in international law tend to enlarge the concept of *force majeure* and refer, sometimes, in connexion with the latter, to the safeguard of the "existence" of the State (see, for instance, Ténékidès, *loc. cit.*, p. 786).

<sup>57</sup> Ténékidès, *loc. cit.*, p. 786. The writer indicates that *force majeure* and state of emergency also differ from each other from the standpoints of application (*mise en œuvre*) and outcome (*résultats*) (*ibid.*).

tive aspect which is lacking in cases of *force majeure*. Certainly, the qualifications that the danger should be "grave and imminent" and that "it cannot be avoided by any other means" set limits which circumscribe strictly a "state of emergency",<sup>58</sup> as the concept is understood today by most of those writers who recognize it in international law.<sup>59</sup> They are not, however, of the same objective nature as the external event or occurrence involved in the concept of *force majeure*.

30. Lastly, as has been noted,<sup>60</sup> in circumstances of "state of emergency" the conduct in question is adopted voluntarily. The particular conditions of strain that could eventually justify that conduct do not amount, in principle, to an unforeseeable or irresistible compelling force, as in the case of *force majeure*. The conduct adopted in "state of emergency" remains an intentional act or omission; it is voluntary conduct that, unlike self-defence, is adopted to safeguard one's own rights by infringing the rights of another State whose conduct is legally irreproachable.<sup>61</sup> The interests of the two conflicting parties are both legitimate and conform to the law.<sup>62</sup> Moreover, the appreciation of the danger and of the unavailability of the means used to avert it is subject to the *modus operandi* of the defence of "state of emergency" and, at least initially, to the subjective interpretation of the State which acts. It is mainly for those reasons that even those who recognize "state of emergency" in international law emphasize that it is an exceptional cause of exoneration, a qualification which is not attached to the exception of *force majeure*.<sup>63</sup>

<sup>58</sup> As has been stated "the state of emergency in international law is narrowly circumscribed by these strict qualifications, which inhibit the improper application of this exceptional rule" (A. Verdross, *Völkerrecht*, 5th ed. (Vienna, Springer, 1964), p. 413, footnote 1).

<sup>59</sup> Actually the argument presented by Anzilotti, and subsequently by other authors, was an attempt to avoid abuses which could eventually result from previous doctrinal positions which try to explain "state of emergency" on the basis of notions such as "self-preservation", "self-protection" or the theory of the fundamental rights of the State (see Anzilotti, *op. cit.*, p. 508).

<sup>60</sup> See para. 25 above.

<sup>61</sup> As has been said,

"the essence of self-defence is a wrong done, a breach of a legal duty owed to the State acting in self-defence. This element ... is clearly essential if self-defence is to be regarded as a legal concept ... It is this precondition of delictual conduct which distinguishes self-defence from the 'right' of necessity" (D. W. Bowett, *Self-Defence in International Law* (Manchester, Manchester University Press, 1958), p. 9).

<sup>62</sup> "A state of emergency, on the other hand, is characterized by the fact that a State confronted with a conflict between the protection of its own vital interests and respect for the right of others violates the right of an innocent State in order to save itself. A State acting in a state of emergency thus violates the right of a State by which it is neither attacked nor threatened" (A. Verdross, "Règles générales du droit international de la paix", *Recueil des cours ... 1929-V* (Paris, Hachette, 1931), vol. 30, pp. 488-489).

<sup>63</sup> See, for instance, A. Cavaglieri, *Corso di diritto internazionale*, 3rd ed. (Naples, Randinella, 1934), p. 535; Ago, "Le délit international", *loc. cit.*, pp. 544-545.

#### (f) The general character of the "exception of *force majeure*"

31. The "exception of *force majeure*" precludes "wrongfulness". States may, however, renounce by prior agreement the exercise of such an exception. In the absence of a general rule to the contrary and unless the specific rule in question provides otherwise, the "exception of *force majeure*" may be invoked regardless of the characteristics of the non-performed international obligation.

32. The "source" of the international obligation (treaty, custom, general principle, unilateral act, decision of a competent organ of an international organization, judgement of the International Court of Justice, award of an arbitration tribunal, etc.) is without incidence on the recognition of *force majeure* as a justification for non-performance. As has been stated, "in fact, it may be taken into consideration, whatever the source of the obligation".<sup>64</sup> Thus, as in the case of any other international obligation, the obligation to carry out a judgement possessing in international law the force of *res judicata* is not impaired if one obligation is prevented from being performed through *force majeure*.<sup>65</sup> This does not exclude, of course, the possibility of arrangements between the parties concerned modifying by common consent the obligation imposed by the judgement, for instance, by taking into account the debtor's capacity to pay.<sup>66</sup>

33. It goes without saying that the "exception of *force majeure*" as a circumstance precluding wrongfulness presupposes that the non-performed international obligation in question be binding at the time when it was supposed to be fulfilled by the State which invoked the exception. Thus, in the case of conventional obligations, the question of invoking the "exception of *force majeure*" does not arise when the contracting States themselves exclude the duty to observe the treaty obligations concerned, and therefore likewise the responsibility for the non-observance of those obligations,<sup>67</sup> either on the basis of a general rule of the law of treaties, such as the one codified in article 61 of the 1969 Vienna Convention on the Law of Treaties,<sup>68</sup> or on the basis of a specific provision of the treaty in question. Treaty clauses reserving the right of contracting parties, on the occurrence of *force majeure* or "fortuitous event", to terminate or suspend wholly or in part obligations provided for in the treaty are well known in international practice. The general rule on terminating, withdrawing from or suspending the operation of a treaty for supervening impossibility of performance,

<sup>64</sup> Reuter, *op. cit.*, p. 115.

<sup>65</sup> See, for instance, Cheng, *op. cit.*, pp. 296 and 339.

<sup>66</sup> See, for instance, *Société Commerciale de Belgique* case (1939) (P.C.I.J., *Séries A/B* 78, pp. 176-178) (see paras. 274-290 below).

<sup>67</sup> See, for instance, P. Fedozzi, *Trattato di diritto internazionale* 3rd ed. (Padua, CEDAM, 1938), vol. I, pp. 542 *et seq.*

<sup>68</sup> See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. 3.70.V.5), p. 789. The Convention is hereinafter referred to as the "Vienna Convention".

codified in article 61 of the Vienna Convention, is drafted taking into account, *inter alia*, situations which may amount to cases of *force majeure*. Not all the hypotheses, however, of supervening impossibility falling under the Vienna rule are necessarily cases of *force majeure*.<sup>69</sup> Moreover—and this is still more obvious—not all cases of *force majeure* are covered by the rule in question.<sup>70</sup> Article 61 of the Vienna Convention concerns only treaty law rules on termination of, withdrawal from or suspension of the operation of treaties, and article 73 stipulates that the rules relating to State responsibility, and thus to the “exception of *force majeure*”, do not fall within the scope of the Convention. This means, in other words, that not all cases in which *force majeure* may be lawfully invoked as a circumstance precluding wrongfulness for non-performance are cases in which *force majeure* could provide a ground for terminating, withdrawing from or suspending the operation of a treaty.<sup>71</sup> It should also be added that conventional obligations tend to be construed not as absolute, but as relative duties. Consequently, it may happen that, as has been underlined, that “they [treaty obligations] are likely to be interpreted in a manner which circumscribes them so as to exclude situations of both absolute and relative impossibility from the very scope of such duties. It follows that, in circumstances of either kind, refusal of performance is not a refusal to perform actual obligations under a treaty, but refusal to perform obligations which ... cannot be considered treaty obligations.”<sup>72</sup>

34. In principle, the “exception of *force majeure*” may be invoked independently of the field to which the international obligation in question may belong. States and international courts and tribunals have dealt with the “exception of *force majeure*” in practically all areas of international law. In the past, the exception has been frequently invoked in connexion with international obligations of States relating to the treatment of aliens in cases of war, civil war, mob violence, riots, etc., but also in connexion with obligations relating to other fields such as sovereignty and territorial integrity of States, rights and duties of neutrals, financial obligations of States, the laws of war, etc. There does not appear to be any particular field of obligations that *as such* could be regarded as outside the possible operation of the “exception of *force majeure*”. There have been, certainly, some controversies relating to the applicability of the “ex-

ception of *force majeure*” in certain areas such as, for example, the laws of war<sup>73</sup> and the treatment of aliens,<sup>74</sup> but the problem has been linked to the question of the “content” of specific international obligations, namely to the content of the primary rules concerned, rather than to the question of excluding whole areas or fields of international law from the scope and *modus operandi* of an “exception of *force majeure*”.

35. The “content” of the specific international obligation or obligations concerned is, on the other hand, highly relevant to determining the admissibility of an “exception of *force majeure*”. This is so not because it could be said, *a priori*, that international obligations of a certain content lay outside the reach of the exception. From such a standpoint, the “content” of the obligation is as irrelevant as its “source” or the field or area of international law to which it belongs. The exception may play its role even in connexion with international obligations of a procedural character such as the principle *audi alteram partem* and other rules governing international judicial proceedings.<sup>75</sup> The relevance of the content of the ob-

<sup>73</sup> A reference to the question may be found in von Liszt (*op. cit.*, p. 202):

“A highly controversial issue is the question of determining to what extent the notions of necessity and of self-defence are capable of application to the laws of war. It is frequently asserted that observance of the laws of war would be by ‘necessities of war’, which the Germans call *Kriegsraison*. The assertion disregards the modern development of the laws of war which *explicitly denies* belligerents ‘unlimited freedom in the choice of means of injuring the enemy’, the *necessaria ad finem belli*; on this point, reference should be made to article 22 of the regulations annexed to the Fourth Convention of 1907. One has no right to bombard an open town, even if the end of the war were to depend on its annihilation. This does not mean that the notion of self-defence has no place in the laws of war; defence is always justified against aggression which is contrary to law. And the notion of ‘state of emergency’ underlies the clause ‘to the extent that circumstances permit’, which frequently occurs in the laws of war (circumstantial clause, *Umstands-Klausel*). [Translation by the Secretariat.]

<sup>74</sup> For example, the doctrine developed by Brusa at the Hague session (1898) of the Institut de droit international, according to which there would be a “legal duty on the part of States to compensate aliens who had incurred losses by reason of governmental acts of the State in which they were residing that had been ordered to suppress internal disturbances” (K. Strupp, “Responsabilité internationale de l’Etat en cas de dommages causés aux ressortissants d’un Etat étranger en cas de troubles, d’émeutes ou de guerres civiles”, The International Law Association, *Report of the Thirty-first Conference* (Buenos Aires, 1922) (London, Sweet and Maxwell, 1923), vol. I, p. 128. The theory of the *risque étatique* developed by Fauchille at the same session of the Institut would also lead to limiting the defence of *force majeure* in cases of internal strife. Both theses were abandoned some time ago. The Institut de droit international at its Lausanne session (1927) itself departed from such theories. Already in 1924, de Visscher stated that “by very reason of the disturbances, the local authorities were unable to take truly adequate preventive or repressive action. International practice has in fact recognized in this a case of *force majeure*” (“La responsabilité des Etats”, *loc. cit.*, p. 104). [Translation by the Secretariat.] This conclusion corresponds to the position consistently taken on the matter by Latin American States and writers (see, for instance, C. Calvo, *Le droit international théorique et pratique*, 5th ed. (Paris, Librairie nouvelle de droit et de jurisprudence, 1896), vol. 3, p. 138).

<sup>75</sup> In the *Electricity Company of Sofia and Bulgaria* case (Order) (1940) for example, the Permanent Court of International Justice

<sup>69</sup> As has been pointed out, “*force majeure* may not be invoked if the impossibility of performance derives from an act attributable to the party invoking it, even if the act in question does not constitute a violation of an international obligation” (Reuter, *op. cit.*, p. 116). The same writer indicates that, in the case of “economical impossibilities” of a non-absolute character, *force majeure* and “fundamental changes of circumstances” tend to come closer to each other (*ibid.*).

<sup>70</sup> “[The] notion of *force majeure* is certainly not limited to the disappearance or destruction of an object essential to the implementation of a treaty” (F. Capotorti, “L’extinction et la suspension des traités”, *Recueil des cours ... 1971-III* (Leyden, Sijthoff, 1972), vol. 134, p. 531).

<sup>71</sup> See paras. 76–80 below.

<sup>72</sup> Schwarzenberger, *op. cit.*, p. 539.

ligation derives from the fact that primary rules may eventually modify, limit and even exclude the normal scope and operation of the "exception of *force majeure*". This happens frequently with respect to conventional rules<sup>76</sup> and may also be so with regard to certain international obligations having another formal "source".<sup>77</sup> As doctrine has underlined, "it is after having determined the content of the rule that one may consider whether there is a situation of *force majeure* justifying non-compliance with it\* and whether it is necessary to invoke this notion".<sup>78</sup>

36. International practice provides examples in which the "exception of *force majeure*" has been invoked in connexion with non-performance resulting from action as well as from omission. The non-performance of international obligations imposing a duty to do something is perhaps more likely to result in assertions of non-performance due to *force majeure*. External events or occurrences in the nature of a *force majeure* may prevent the obligor from doing what an obligation of that kind may have provided for, giving rise to a claim of non-performance by omission. An example is the failure to take due measures to protect a foreign diplomatic envoy in a riot situation. Lack of payment of a State's debt would be another example of non-performance by omission in which *force majeure* has sometimes been alleged. But an event or occurrence amounting to *force majeure* may also give rise to claims of non-performance by action, when the international obligation in question imposes the duty to abstain from doing what has been done. Thus, an "exception of *force majeure*", because of weather conditions or mechanical troubles, has been frequently advanced in connexion with alleged violations of the aerial space of a State by a military aircraft of another State. The "exception of *force majeure*" may also operate vis-à-vis obligations requiring a particular act or omission (obligations of conduct), as well as in respect of obligations requiring in general terms that a particular result shall be achieved without specifying the means to be employed to that end (obligations of result). It may be, however, that the characteristics of the obligation such as the ones de-

scribed above could eventually have a certain incidence on the way in which the "exception of *force majeure*" is applied.

37. Finally, it should be noted that, as indicated earlier,<sup>79</sup> the event or occurrence which creates a situation of *force majeure* and prevents the fulfilment of the obligation concerned may be caused by all kinds of circumstances. The impossibility of performance so created may be, therefore, of a material as well as a juridical or moral nature. As has been stated, "contemporary doctrine recognizes two sorts of impossibility and embraces both in the expression *force majeure*".<sup>80</sup> In its advisory opinion of 7 June 1955 on the question of *South-West Africa—Voting Procedure*, the International Court of Justice considered that the question of the conformity of the voting system of the General Assembly with that of the Council of the League of Nations presented "insurmountable difficulties of a juridical nature". The relevant passage of the advisory opinion reads as follows:

The voting system of the General Assembly was not in contemplation when the Court, in its Opinion of 1950, stated that "supervision should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations".<sup>81</sup> The constitution of an organ usually prescribes the method of voting by which the organ arrives at its decisions. The voting system is related to the composition and functions of the organ. It forms one of the characteristics of the constitution of the organ. Taking decisions by a two-thirds majority vote or by a simple majority vote is one of the distinguishing features of the General Assembly, while the unanimity rule was one of the distinguishing features of the Council of the League of Nations. These two systems are characteristic of different organs, and one system cannot be substituted for the other without constitutional amendment. To transplant [to] the General Assembly the unanimity rule of the Council of the League would not be simply the introduction of a procedure, but would amount to a disregard of one of the characteristics of the General Assembly. Consequently the question of conformity of the voting system of the General Assembly with that of the Council of the League of Nations presents insurmountable difficulties of a juridical nature. For these reasons, the voting system of the General Assembly must be considered as not being included in the procedure which, according to the previous Opinion of the Court, the General Assembly should follow in exercising its supervisory functions.<sup>82</sup>

A juridical impossibility in municipal law, such as the lack of appropriate implementing domestic legislation, could not, however, be invoked today in international law as a *force majeure* justifying the non-performance of an international obligation. As article 4 of the "Draft articles on State responsibility" adopted in first reading by the International Law Commission provides,

an act of a State may only be characterized as internationally wrongful by international law. Such a characterization cannot be affected by the characterization of the same act as lawful by internal law.<sup>83</sup>

(Foot-note 75 continued.)

decided that Bulgaria could not by its own volition prevent the continuation of instituted proceedings by abstaining "without valid reasons" from presenting a rejoinder after the original time-limit for doing so had already been once extended. (See paras. 291–297 below.)

<sup>76</sup> See paras. 39–117 below.

<sup>77</sup> "For the purposes of international law, war is no longer a matter of external policy, but is either legal or illegal. In relation to third States, it is at least arguable that measures of aggressive war are no longer covered by the plea of necessity. Similarly, it is possible to hold that an aggressor can no longer be allowed to rely on the character of *force majeure* of counter-measures taken in self-defence by his opponent. Then, at least in relation to any State which is a party to a treaty outlawing aggressive war or the use of force, a treaty-breaker may be regarded as estopped from ascribing his own measures of aggressive warfare to necessities of war or those of his enemy to *force majeure* (Schwarzenberger, *op. cit.*, p. 646).

<sup>78</sup> J. Basdevant, *loc. cit.*, p. 556.

<sup>79</sup> See para. 4 above.

<sup>80</sup> L. Delbez, *Les principes généraux du droit international public*, 3rd ed. (Paris, Librairie générale de droit et de jurisprudence, 1964), p. 340.

<sup>81</sup> *I.C.J. Reports*, 1950, p. 138.

<sup>82</sup> *I.C.J., Reports*, 1955, p. 75.

<sup>83</sup> For reference, see foot-note 9 above.



## CHAPTER I

## State practice

38. The materials and information reproduced in this chapter have been divided into two main sections. Section 1 is devoted to State practice as reflected in treaties and other international instruments and in proceedings relating thereto. Section 2 concerns State practice as reflected in diplomatic correspondence and other official papers dealing with specific cases.

## SECTION 1. STATE PRACTICE AS REFLECTED IN TREATIES AND OTHER INTERNATIONAL INSTRUMENTS AND PROCEEDINGS RELATING THERETO

39. Like any other rule governing State responsibility for internationally wrongful acts, *force majeure* and fortuitous event as circumstances precluding wrongfulness operate in international law independently of any special agreement between the States concerned. On the other hand, nothing prevents States from inserting in treaties and other international instruments express provisions thereon. Actually, treaties and other international instruments sometimes contain provisions of that kind.<sup>84</sup> The content of such provisions may merely reflect the situation in international law, but on other occasions the scope of *force majeure* and fortuitous event as circumstances precluding wrongfulness under international law is either enlarged<sup>85</sup> or narrowed<sup>86</sup> by the

<sup>84</sup> Economic development agreements concluded between States and private investors also very often contain *force majeure* clauses. For an analysis of those clauses, see G. R. Delaume, "Excuse for non-performance and *force majeure* in economic development agreements", *Columbia Journal of Transnational Law* (New York), vol. 10, No. 2 (Autumn, 1971), p. 242. The writer points out that the stipulations in current use in those agreements fall into two major categories depending upon whether they merely incorporate into the agreement the concept of *force majeure* accepted in a given system of law, which may or may not be the proper law of the agreement (reference clause), or attempt to arrive at an original definition adapted to the particular circumstances of the case (qualitative clauses) (*ibid.*, p. 245). The author concludes that in those clauses no serious attempt is made at defining the events which may constitute a cause of excuse and that, subject to variations in scope and precisions, they indicate, *inter alia*, that the failing party will not be excused unless it is in a position to establish that (a) it is not in default at the time of the occurrence of an event of *force majeure* and has made all reasonable efforts to avoid the failure, or more generally that the event is beyond its reasonable control, (b) there is a direct nexus or causal relation between the event involved and failure to perform, and (c) as a result of the event in question performance has been hindered or delayed, or has become totally impossible (*ibid.*, pp. 263-264).

<sup>85</sup> Examples of that tendency may be found in some of the "non-responsibility clauses" inserted in treaties regulating State responsibility for damages sustained by foreigners in the course of civil wars, revolutions and other internal disturbances, concluded by Latin American countries with other Powers during the nineteenth and the beginning of the twentieth century in order to counteract claims of nations considered more powerful (see, for instance, H. Arias, "The non-liability of States for damages suffered by foreigners in the course of a riot, an insurrection, or a civil war", *American Journal of International Law* (New York), vol. 7, No. 4 (October 1913), pp. 755-764).

<sup>86</sup> Treaty provisions narrowing the normal scope of operation of *force majeure* and "fortuitous event" as circumstances precluding wrongfulness may be found, for instance, in peace treaties as well

treaty provisions concerned. It may even happen that the defences of *force majeure* and fortuitous event may be altogether excluded by agreement in the relations between contracting parties. The rules of State responsibility regarding those defences would not appear to have or present the features of a *jus cogens* rule, namely of a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. The normal scope and *modus operandi* of *force majeure* and fortuitous event as circumstances susceptible of precluding wrongfulness could, therefore, be said to be subject to a general condition that the primary rules concerned (conventional or customary) have not otherwise provided. Certain provisions in treaties and other international agreements do reveal on the part of the parties an awareness of the need to circumscribe *force majeure* within precise limits. To that end, it is sometimes specified that certain conditions must be satisfied before an event of *force majeure*, as defined in the treaty or agreement concerned, can be recognized as such. There are also treaty provisions which clearly assign to the party invoking *force majeure* the burden of establishing the causal relation between the event or events relied upon as an excuse and the resulting impossibility of performing the international obligation.

40. Treaty provisions concerning *force majeure* and fortuitous event as defences or exceptions may be inserted in bilateral as well as in multilateral instruments. Examples of that kind of bilateral treaty provision are numerous.<sup>87</sup> For the purpose of the

as in other kinds of international agreements, independently of whether the treaties in question deal with State responsibility for internationally wrongful acts "objectively, or whether they take account of the "fault" element in establishing that responsibility. Conventional liability régimes based upon the principle of "absolute" or "strict" liability for certain hazardous or ultra-hazardous activities also provide examples of treaty provisions limiting the normal scope of *force majeure* and fortuitous event (see paras. 106-117 below).

<sup>87</sup> See, for instance, article XVIII, paragraph 1, of the Treaty between the United States of America and Canada relating to co-operative development of the water resources of the Colombia River Basin, signed at Washington on 17 January 1961, which

present paper, however, it would not appear necessary to survey such bilateral clauses. On the other hand, and without prejudice to the reservation made in the preceding paragraph, to identify those types of provision in multilateral instruments, particularly in codification instruments and other instruments of a law-making character, could be useful as a means of ascertaining the state and evolution of international law on the matter.

41. In order to keep the paper within manageable proportions and to avoid unnecessary repetition, the corresponding research has been limited to multilateral treaties and other international instruments relating to some previously selected areas of international law which would appear to present, *a priori*, major interest for the purpose stated above. Such an approach is also intended to underline the fact that *force majeure* and fortuitous event are circumstances precluding wrongfulness susceptible of operating in connexion with all kinds of international obligations and independently of the sector of international law to which the obligations concerned may belong.

42. It should also be noted that the content of the primary rules the violation of which may give rise to international responsibility could be highly relevant to the matter. It is obvious that *force majeure* and "fortuitous event" as defences will not operate in the same way vis-à-vis an international obligation which incorporates elements such as "willingness", "fault" or "negligence" as with regard to international obligations limiting or excluding those elements. It is for this reason that a certain number of provisions which could be viewed as belonging properly to the realm of primary rules have been retained in the present section by way of illustration. They serve also as examples of the acceptance of the concepts of *force majeure* and fortuitous event in international law.

43. Other provisions also included in the present section, like those whose wording refers to "vital interest of the nation" or to other equivalent expressions, would seem to envisage situations falling under the notion of "state of emergency (*état de nécessité*)" rather than under *force majeure* or fortuitous event. The inclusion of a few provisions of that kind has been, however, considered appropriate, in order to take account of the problem of the distinction that should be made between *force majeure* and fortuitous event, on the one hand, and "state of emergency", on the other, as two different kinds of circumstances precluding wrongfulness. Those examples serve also to illustrate the point that in the wording of treaties it is not always easy to make a clear-cut

distinction between the different types of circumstances precluding wrongfulness.

44. Finally, the account of provisions in multilateral treaties and other international instruments recorded in the present section has been supplemented, in in some instances, by materials in the nature of *travaux préparatoires* and by relevant information provided in other published official proceedings relating to the intergovernmental negotiation of multilateral instruments.

### (a) International peace and security

#### DEFINITION OF AGGRESSION ADOPTED BY THE GENERAL ASSEMBLY IN 1974

45. The "Definition of Aggression" adopted by the General Assembly of the United Nations on 14 December 1974,<sup>88</sup> states, in article 1, that aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.<sup>89</sup>

Paragraph 4 of resolution 3314 (XXIX) calls the attention of the Security Council to the Definition of Aggression annexed thereto, and recommends that it should, as appropriate, take account of that Definition as guidance in determining, in accordance with the Charter, the existence of an act of aggression.

46. That provision is supplemented by the one set forth in article 3 of the Definition, which enumerates a series of acts that, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, be qualified as an act of aggression.<sup>90</sup>

<sup>88</sup> Resolution 3314 (XXIX), annex.

<sup>89</sup> Nothing in the definition: (a) shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful (art. 6); (b) could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (art. 7); (c) in particular article 3 (c), shall be construed as a justification for a State to block, contrary to international law, the routes of free access of a land-locked country to and from the sea (*Official Records of the General Assembly, Twenty-ninth Session, Annexes, agenda item 86, document A/9890, para. 9*); (d) in particular article 3 (d), shall be construed, as in any way prejudicing the authority of a State to exercise its rights within its national jurisdiction, provided such exercise is not inconsistent with the Charter of the United Nations (*ibid.*, para. 10).

<sup>90</sup> The acts specifically enumerated in article 3 are the following:

"(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

"(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(Foot-note 87 continued.)

reads as follows: "The United States of America and Canada shall be liable [each] to the other and shall make appropriate compensation to the other in respect of any act, failure to act, omission or delay amounting to a breach of the Treaty or of any of its provisions other than an act, failure to act, omission or delay occurring by reason of war, strike, major calamity, act of God, uncontrollable force or maintenance curtailment" (*Legislative texts and treaty provisions concerning the utilization of international rivers for other purpose than navigation* (United Nations publication, sales No. 53.V.4, p. 218).



47. Article 5 of the Definition—paragraph 2 of which states that “a war of aggression is a crime against international peace” and that “aggression gives rise to international responsibility”<sup>91</sup>—provides in paragraph 1 that “no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression”<sup>92</sup>. So far as the determination of the commission of “an act of aggression” is concerned, article 2 of the Definition—following the statement in the preamble that the question “must be considered in the light of all the circumstances of each particular case”—stipulates the following:

The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

48. The provisions of the Definition dealing with the determination of “an act of aggression” gave rise to a series of statements by representatives of Member States, both in the Special Committee on the

Question of Defining Aggression<sup>93</sup> and in the Sixth Committee of the general Assembly.<sup>94</sup> Certain passages of those statements refer to the question of the weight that should be attached, by the Security Council, in the light of the wording of the provisions concerned, to the circumstances surrounding each specific case and, in particular, to elements such as “intent”, “aims” or “motives”.

49. It appears from those statements that article 2 of the Definition takes into account both the principle of priority (first use of armed force) and the discretionary powers of the Security Council, acting in conformity with the Charter, to determine in the light of “other relevant circumstances” whether or not an act of aggression had been committed in the specific case concerned. Several representatives expressly mentioned that elements such as “intent”, “aims” or “motives” were covered in article 2 by the words “other relevant circumstances”<sup>95</sup> or that such words covered “all” relevant circumstances.<sup>96</sup> Other representatives stated expressly that “intent”, “purpose” or “aims” were not supposed to be covered by the reference made in article 2 to “other relevant circumstances”<sup>97</sup>. Certain other representatives adopted some kind of intermediate positions<sup>98</sup> and some of them distinguished between “aggravating” and “exonerating” circumstances.<sup>99</sup> Lastly, other representatives did not refer expressly to the matter, although differences of degree as to the relative importance of the principle of the first use of force in

(Foot-note 90 continued.)

“(c) The blockade of the ports or coasts of a State by the armed forces of another State;

“(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

“(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

“(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

“(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”

<sup>91</sup> In an explanatory note in paragraph 20 of the report of the Special Committee on the Question of Defining Aggression, it is stated that the words “international responsibility” are used without prejudice to the scope of this term (*ibid.*, *Twenty-ninth Session, Supplement No. 19* (A/9619 and Corr.1)). State responsibility for aggression had already been stated in instruments and drafts prepared before the adoption of the Definition. See, for instance, the second paragraph of the principle that States shall refrain in their international relations from the threat or use of force embodied in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970 (resolution 2625 (XXV), annex). See also principles VII and IX of the “Principles of international law that govern the responsibility of the State in the opinion of Latin American countries”, prepared by the Inter-American Juridical Committee in 1962 (*Yearbook ... 1969*, vol. II, p. 153, document A/CN.4/217 and Add.1, annex XIV).

<sup>92</sup> A note in paragraph 20 of the report of the Special Committee on the Question of Defining Aggression explains that the Committee had in mind, in particular, the principle contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations according to which “no State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State” (*Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 19* (A/9619 and Corr.1)).

<sup>93</sup> *Ibid.*, annex I.

<sup>94</sup> *Ibid.*, *Twenty-ninth Session, Sixth Committee*, 1471st to 1483rd, 1488th, 1489th and 1502nd to 1504th meetings.

<sup>95</sup> See, for instance, statements by the representatives of *Australia* (*ibid.*, 1478th meeting, para. 29); *Belgium* (*ibid.*, 1476th meeting, para. 9); *Bulgaria* (*ibid.*, 1472nd meeting, para. 42); *Canada* (*ibid.*, 1473rd meeting, para. 10); *Chile* (*ibid.*, 1474th meeting, para. 18); *German Democratic Republic* (*ibid.*, 1476th meeting, para. 15); *Greece* (*ibid.*, 1482nd meeting, para. 48); *Guatemala* (*ibid.*, 1479th meeting, para. 22); *Jamaica* (*ibid.*, 1480th meeting, para. 3); *Japan* (*ibid.*, 1473rd meeting, para. 19 and *ibid.*, *Supplement No. 19* (A/9619 and Corr.1), p. 16); *Mongolia* (*ibid.*, *Sixth Committee*, 1474th meeting, para. 11); *Netherlands* (*ibid.*, 1473rd meeting, para. 3); *Paraguay* (*ibid.*, 1483rd meeting, para. 4); *Turkey* (*ibid.*, 1477th meeting, para. 27); *Ukrainian SSR* (*ibid.*, 1477th meeting, para. 11); *USSR* (*ibid.*, 1472nd meeting, para. 5); *United Kingdom* (*ibid.*, 1477th meeting, para. 20); *United States of America* (*ibid.*, 1480th meeting, para. 70 and *ibid.*, *Supplement No. 19* (A/9619 and Corr.1), p. 24).

<sup>96</sup> See, for example, statements by the representatives of *Madagascar* (*ibid.*, *Sixth Committee*, 1474th meeting, para. 36) and the *United Republic of Cameroon* (*ibid.*, 1383rd meeting, para. 11).

<sup>97</sup> See, for example, statements made by representatives of *Algeria* (*ibid.*, 1479th meeting, para. 32); *Cuba* (*ibid.*, 1479th meeting, para. 41); *India* (*ibid.*, 1478th meeting, para. 47); *Kenya* (*ibid.*, 1474th meeting, para. 23); *Mexico* (*ibid.*, *Supplement No. 19* (A/9619 and Corr.1), pp. 38 and 39); *Syrian Arab Republic* (*ibid.*, pp. 19 and 20); *Yugoslavia* (*ibid.*, *Sixth Committee*, 1479 meeting, para. 6).

<sup>98</sup> See, for example, statements made by representatives of *Austria* (*ibid.*, 1472nd meeting, para. 32); *Cyprus* (*ibid.*, 1479th meeting, para. 14); *Ivory Coast* (*ibid.*, 1481st meeting, para. 81); *New Zealand* (*ibid.*, 1475th meeting, para. 23); *Sweden* (*ibid.*, 1472nd meeting, para. 8).

<sup>99</sup> See, for instance, the statement by the representative of *Romania* (*ibid.*, 1475th meeting, para. 5).

the Definition may be perceived in their statements.<sup>100</sup>

50. No reference was made during the debate to *force majeure* and "fortuitous event" as circumstances precluding wrongfulness. Certain representatives distinguished however, between "intent", in the sense of "voluntary act", and "motives".<sup>101</sup> Thus, the representative of Iraq pointed out the following:

The text of the draft definition also made it possible to raise the problem of involuntary acts. In fact, aggression could be only voluntary but an involuntary act might sometimes seem like aggression. Balance was preserved in the text, however, for article 5, first paragraph, restricted that possibility by stating that no consideration of whatever nature, whether political, economic, military or otherwise, might serve as a justification for aggression. With that sentence, the drafters emphasized that the motives for the act, as distinct from the perpetrator's intention, could not be taken into consideration.<sup>102</sup>

It is difficult to conceive of "aggression", and in particular a "war of aggression", otherwise than as a voluntary act of the State concerned, but damages may result from uses of military force or weapons due to a "fortuitous event" or *force majeure*. Such accidents may occur not only along the land boundaries of a given country, but also at sea and even deep inside the territory of a State, as, for example, in the case of an accidental release of bombs from a foreign armed military aircraft in distress.<sup>103</sup>

### (b) International economic law

#### GENERAL AGREEMENT ON TARIFFS AND TRADE (1947)

51. Often, multilateral agreements relating to trade, commodities, economic unions, etc., provide specifically for exceptions, some of which could be eventually invoked in cases of *force majeure*. For instance, article XX of the General Agreement on Tariffs and Trade,<sup>104</sup> entitled "General exceptions", states that, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail,

<sup>100</sup> See, for instance, statements by the representatives of *Brazil* (*ibid.*, 1474th meeting, para. 48); *Burundi* (*ibid.*, 1382nd meeting, para. 8); *China* (*ibid.*, 1475th meeting, para. 16); *Colombia* (*ibid.*, 1464th meeting, para. 56); *France* (*ibid.*, para. 28); *Indonesia* (*ibid.*, 1482nd meeting, para. 34); *Iran* (*ibid.*, 1480th meeting, para. 12); *Iraq* (*ibid.*, 1478th meeting, para. 7); *Mali* (*ibid.*, 1480th meeting, para. 8); *Pakistan* (*ibid.*, 1477th meeting, para. 2); *Spain* (*ibid.*, 1472nd meeting, para. 37); *Sri Lanka* (*ibid.*, 1478th meeting, para. 56).

<sup>101</sup> See statements by the representatives of *Tunisia* (*ibid.*, 1482nd meeting, para. 23) and *Iraq* (*ibid.*, 1478th meeting, para. 8).

<sup>102</sup> *Ibid.*

<sup>103</sup> The fortuitous event or *force majeure* in question may be exclusively related to the accidental release of the bombs. In such a case, the exception could not, of course, be of relevance as a circumstance precluding the wrongfulness of any internationally wrongful act committed by the aircraft *before* such an event, such as, for instance, the violation of the aerial space of the territorial State when the flight was not authorized by the latter.

<sup>104</sup> GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No., GATT/1969-1).

or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures necessary to protect public morals, human, animal or plant life or health; imposed for the protection of national treasures of artistic, historic or archaeological value; relating to the conservation of exhaustible natural resources; involving restrictions on exports of domestic materials necessary to ensure the provision of essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan, etc.<sup>105</sup>

52. Emergency action on imports of particular products as a result of "unforeseen developments" is also provided for in article XIX, paragraph 1 (a), of the Agreement, as follows:

If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

#### CONVENTION ON TRANSIT TRADE OF LAND-LOCKED STATES (1965)

53. The Convention on Transit Trade of Land-locked States,<sup>106</sup> done at New York on 8 July 1965, states, in paragraph 1 of its article 7, that, except in cases of *force majeure* all measures shall be taken by Contracting States to avoid delays in or restrictions on traffic in transit.

Article 11 provides for exceptions to the Convention on grounds, *inter alia*, of public morals, public health or security, as a precaution against diseases of animals or plants or against pests, as well as for the protection of its essential security interests. Article 12 allows, in certain conditions, deviations from the provisions of the Convention in case of an "emergency" endangering the political existence of the transit State or its safety.

#### COMMODITY AGREEMENTS

54. A series of examples may also be found in commodity agreements. For instance, article 12 (4) of the *International Sugar Agreement of 1958*<sup>107</sup> provides that the International Sugar Council may modify the amounts to be deducted under the article if it is

<sup>105</sup> Article XXI of the Agreement enumerates also a series of "security exceptions". For instance, it is stated that nothing in the Agreement shall be construed to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

<sup>106</sup> United Nations, *Treaty Series*, vol. 597, p. 3.

<sup>107</sup> *Ibid.*, vol. 385, p. 137.

satisfied by an explanation from the participating country concerned that its net exports fell short by reason of *force majeure*. Article 46 (6) of the *International Sugar Agreement, 1968*<sup>108</sup> has a similar provision. In addition, article 56 of the latter Agreement sets forth a general rule concerning relief from obligations "in exceptional circumstances". Paragraph 1 of the article reads as follows:

(1) Where it is necessary on account of exceptional circumstances or emergency or *force majeure* not expressly provided for in the Agreement, the Council may, by special vote, relieve a Member of an obligation under the Agreement if it is satisfied by an explanation from that Member that the implementation of that obligation constitutes a serious hardship for, or imposes an inequitable burden on, such Member.

55. Article 60, paragraph 1, of the *International Coffee Agreement, 1962*<sup>109</sup> states:

(1) The Council may, by a two-thirds distributed majority vote, relieve a Member of an obligation which, on account of exceptional or emergency circumstances, *force majeure*, constitutional obligations, or international obligations under the United Nations Charter for territories administered under the trusteeship system, either:

- (a) constitutes a serious hardship;
- (b) imposes an inequitable burden on such Members; or
- (c) gives other Members an unfair or unreasonable advantage.

Paragraph 1 of article 57 of the *International Coffee Agreement, 1968*<sup>110</sup> contains a similar provision, which omits, however, subparagraphs (a), (b) and (c) above. This is also the case in the *International Cocoa Agreement, 1972*<sup>111</sup> (art. 59) and the *International Cocoa Agreement, 1975*<sup>112</sup> (art. 60). No mention is made in these Agreements of "constitutional obligations".

56. The *International Agreement on Olive Oil, 1956*,<sup>113</sup> (amended in 1958) and the *International Olive Oil Agreement, 1963*<sup>114</sup> lay down a procedure to withdraw from the Agreement which applies, under certain specified circumstances, when a participating Government declares that "circumstances beyond its control" prevent it from fulfilling its obligations under the Agreement concerned (art. 39, para. 2 (a)). Moreover, commodities agreements sometimes contain exceptions for reasons of "national security".<sup>115</sup>

#### AGREEMENTS ESTABLISHING ECONOMIC COMMUNITIES OR FREE TRADE ASSOCIATIONS

57. Treaties establishing economic communities also provide for exceptional situations, including those which may amount to cases of *force majeure*.

<sup>108</sup> *Ibid.*, vol. 654, p. 3.

<sup>109</sup> *Ibid.*, vol. 469, p. 169.

<sup>110</sup> *Ibid.*, vol. 647, p. 3.

<sup>111</sup> *United Nations Cocoa Conference, 1972* (United Nations publication, Sales No. E.73.II.D.9), p. 7.

<sup>112</sup> *United Nations Cocoa Conference, 1975* (United Nations publication, Sales No. E.76.II.D.9 and Corrigendum), p. 5.

<sup>113</sup> United Nations, *Treaty Series*, vol. 336, p. 177.

<sup>114</sup> *Ibid.*, vol. 495, p. 3.

<sup>115</sup> See, for example, article XVI of the 1954 International Tin Agreement (*ibid.*), vol. 256, p. 31.

One example may be found in article 224 of the *Treaty establishing the European Economic Community*,<sup>116</sup> done at Rome on 25 March 1957, which is drafted as follows:

Member States shall consult one another for the purpose of enacting in common the necessary provisions to prevent the functioning of the Common Market from being affected by measures which a Member State may be called upon to take in case of serious internal disturbances affecting public order, in case of war or of serious international tension constituting a threat of war or in order to carry out undertakings into which it has entered for the purpose of maintaining peace and international security.

58. The *Convention establishing the European Free Trade Association*,<sup>117</sup> signed at Stockholm, on 4 January 1960, and the *Treaty establishing a Free Trade Area and instituting the Latin American Free Trade Association*,<sup>118</sup> signed at Montevideo, on 18 February 1960, specify (art. 12 and art. 53, respectively) that States members of the Associations are allowed to adopt and enforce measures necessary to protect public morals, human, animal or plant life and health, national treasures of artistic, historic or archaeological value, to prevent disorder or crime, etc.

#### (c) Treatment of aliens

##### REPORT OF THE SPECIAL COMMISSION OF JURISTS OF THE LEAGUE OF NATIONS (1924)

59. By a resolution adopted on 28 September 1923, the Council of the League of Nations instructed a Special Commission of Jurists to reply to certain questions arising out of the interpretation of the Covenant and other points of international law.<sup>119</sup> The Special Commission met for the first time from 18 to 24 January 1924. In a letter dated 24 January 1924, the Chairman of the Special Commission of Jurists, Mr. Adatci (Japan), notified the President of the Council of the League of the replies agreed upon by the jurists of the Special Commission.<sup>120</sup> The reply of the Special Commission of Jurists to question V (In what circumstances and to what extent is the responsibility of a State involved by the commission of a political crime in its territory?) states, *inter alia*, that the responsibility of a State is only involved by the

<sup>116</sup> *Ibid.*, vol. 298, p. 3.

<sup>117</sup> *Ibid.*, vol. 370, p. 3.

<sup>118</sup> Inter-American Institute of International Legal Studies, *Instruments of Economic Integration in Latin America and in the Caribbean* (New York, Oceana, 1975), vol. I, p. 15; see also France, Secrétariat général du gouvernement, *La documentation française, Notes et études documentaires* (Paris), 31 January 1969, Nos. 3558-3559; and United Nations, *Official Records of the Economic and Social Council, Thirtieth Session, Supplement No. 4*, annex II.

<sup>119</sup> In addition to Mr. Adatci and the Director of the Legal Section of the Secretariat of the League of Nations, the Special Commission was composed of jurists from Belgium, Brazil, the British Empire, France, Italy, Spain, Sweden and Uruguay.

<sup>120</sup> Council of the League of Nations, Minutes of the twenty-eighth session, held at Geneva from Monday, 10 March to Saturday, 15 March 1924, sixth meeting (League of Nations, *Official Journal*, 5th year, No. 4 (April 1924), p. 523).

commission in its territory of a political crime against the persons of foreigners if the State has "neglected to take all reasonable measures" for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.<sup>121</sup>

CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW (THE HAGUE, 1930)

60. The list of points submitted to Governments for comments by the Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930) in connexion with the topic "Responsibility of States for damage caused in their territory to the person or property of foreigners" contained a point XI entitled "Circumstances in which a State is entitled to disclaim responsibility".<sup>122</sup> Neither point XI nor the corresponding Bases of discussion drawn up by the Preparatory Committee (Bases Nos. 1, 24, 25, 26 and 27)<sup>123</sup> refer however to *force majeure* or to "fortuitous event". *Force majeure* and "fortuitous event" were rather taken into account, both by Governments and by the Preparatory Committee, in the considerations advanced and proposals made in connexion with other points and Bases of discussion. The wording of several Bases would suggest that, at least with regard to some of them, "circumstances" such as *force majeure* and "fortuitous event" should not be disregarded in the process of determining compliance with or a violation of the provisions concerned. The written replies submitted by Governments to those other points and the official proceedings of the Conference itself confirm, generally speaking, that such an interpretation was very much shared by Governments and that for some of them to clarify, as much as possible, the matter was one of the main subjects of preoccupation.

61. Thus, an express reference to *force majeure* (*vis major*) may be found in the general comments made by *France* in connexion with point III (Acts of the legislative organ) of the list and by *Switzerland* on point V (Acts of the executive organ). They read as follows:

<sup>121</sup> *Ibid.*, p. 524.

<sup>122</sup> Point XI was drafted as follows:

"XI. Circumstances in which a State is entitled to disclaim responsibility. What are the conditions which must be fulfilled in such cases: (a) When a State claims to have acted in self-defence?; (b) When a State claims to have acted in circumstances which justified policy of reprisals?; (c) When the State claims that circumstances justify the unilateral abrogation of its contractual engagements?; (d) When the individual concerned has contracted not to have recourse to the diplomatic remedy?" (See League of Nations, *Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (document C.75.M.69.1929.V), p. 161.

Except for Basis No. 1 (invocation of municipal law), those Bases were not considered by the Third Committee of the Conference.

<sup>123</sup> See *Yearbook ... 1956*, vol. II, pp. 223-225, document A/CN.4/96, annex 2.

*France:*

No court has jurisdiction to hear a claim for reparation in respect of damage caused by an act of Parliament.

There are only two exceptions to this:

(1) If Parliament itself has granted an indemnity by law;

(2) If the private individual injured is bound by contract with the Government (a former concessionaire of public works or some other public service); in this case, he can obtain an indemnity ordered by the judge on the strength of his contract and on the basis of a theory known as "*imprévision*" (an unforeseen circumstance). The law in question is regarded as an instance of *vis major*. If it results in an increase in the burdens to be borne by the concessionaire which could not be foreseen at the time when the contract was concluded, the concessionaire is entitled to an indemnity as a set-off to this extra contractual burden.<sup>124</sup>

*Switzerland:*

It has been argued that an act accomplished by a State within the limits of its law and inspired by considerations of national defence does not constitute an international delict even though it may injure another State. A rule like this would obviously be too absolute; it would create conditions of juridical uncertainty almost amounting to a total negation of law. We should however, admit the right of self-preservation and allow to the State a right of lawful defence, provided this right is interpreted strictly and is rigorously subordinated to the existence of unjust and unlawful aggression. We should therefore clearly distinguish between this right and the law of necessity, which can be used as a cloak to cover every form of injustice and arbitrariness. An exception to international responsibility should also be allowed in the case of purely fortuitous occurrences or cases of *vis major*, it being understood that the State might nevertheless be held responsible if the fortuitous occurrence or *vis major* were preceded by a fault, in the absence of which no damage would have been caused to a third State in the person or property of its nationals.<sup>125</sup>

62. Bases of discussion Nos. 2 and 7<sup>126</sup> state that a State is responsible for damage suffered by a foreigner as the result of the enactment or non-enactment of legislation, or of an act or omission on the part of the executive power, incompatible with the "international obligations" of the State. Questions of language apart, the same basic principle was incorporated in articles 6 (legislative acts) and 7 (executive acts) adopted in first reading by the Third Commit-

<sup>124</sup> League of Nations, *Conference ... Bases of Discussion ... (op. cit.)*, p. 197. In the reply by France to point V (Acts of the executive organ), a distinction is made between cases of responsibility provided for in particular texts and cases of responsibility apart from all texts. With respect to the latter category, it is said that the public authority always incurs responsibility in the case of a fault in the public services (*faute de service public*) and that sometimes the public authority incurs responsibility even when no "service fault" has been committed. Reference is also made to decisions of the *Conseil d'Etat* (Council of State) distinguishing between "a serious fault" (*une faute lourde*), "grave imprudence" (*une imprudence grave*) and "an obvious and particularly serious fault" (*une faute manifeste et particulièrement grave*) (*ibid.*, pp. 198 and 199).

<sup>125</sup> *Ibid.*, p. 241.

<sup>126</sup> *Yearbook ... 1956*, vol. II, p. 223, document A/CN.4/96, annex 2.

tee of the Conference.<sup>127</sup> Such articles do nothing more in this respect than to spell out the general rule embodied in article 1,<sup>128</sup> according to which international responsibility is incurred by a State if there is any "failure"<sup>129</sup> on the part of its organs to carry out the "international obligations" of the State. It should be noted, however, that the expression "international obligations" is defined for the purpose of the intended convention in article 2—an article also adopted in first reading by the Third Committee of the Conference—by reference not only to obligations resulting from "treaty" or "custom" but also to obligations resulting from "the general principles of law".<sup>130</sup> It should be noted in that connexion that *force majeure* has been recognized as one of those principles.<sup>131</sup> The inadvisability of excluding any consideration of "the general principles of law" was underlined in the Third Committee of the Conference by several representatives, some of whom, like the representative of *Finland*, linked the matter to the interpretation and application of those Bases of discussion according to which whether the State incurs international responsibility depends upon the "circumstances".<sup>132</sup> Particularly relevant in this respect is the following statement made by the representative of *Portugal* in the Third Committee during the consideration of Basis No. 7:

There need be no fear that, by admitting the objective conception of responsibility, we shall set aside all individualistic or subjective factors. This conception naturally leads us to consider the infringement of the obligation as the fundamental fact which is sufficient to involve responsibility. But this responsibility may vary in extent and gravity according to the nature of the infringement itself ... It may also vary according to the circumstances in which the irregular or illegal act is committed, and those circumstances may vary in gravity. They may, for instance, amount to fault, fraud or negligence.<sup>133</sup>

63. It should also be pointed out that the Basis of discussion established by the Preparatory Committee, taking account of Government replies to queries under point IV (Acts relating to the operation of the

<sup>127</sup> *Ibid.*, pp. 225–226, annex 3.

<sup>128</sup> *Ibid.*, p. 225.

<sup>129</sup> It is interesting to note that the word "failure", used in article 1, does not appear in articles 6 and 7. It was feared that the use of the word "failure" in the latter articles would embark the Third Committee of the Conference upon a consideration of the "theory of fault". See statements by representatives of *Belgium*, *Italy* and the *Netherlands* in League of Nations, *Acts of the Conference for the Codification of International Law* (The Hague, 13 March–12 April 1930), vol. IV, *Minutes of the Third Committee* (C.351(c).M.145(c).1930.V), pp. 33 and 36. A proposal made at the Conference by *Hungary*, according to which "if the damage suffered by a foreigner is the result of acts or omissions of the administrative organs, the State is only responsible if it does not afford the foreigner a possibility of enforcing his claims as against the organs at fault \* ... " was not retained by the Third Committee (for the full text, *ibid.*, p. 226).

<sup>130</sup> *Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3.

<sup>131</sup> For instance, by the Permanent Court of Arbitration in the *Russian Indemnity* case (1912) (see paras. 388–394 below).

<sup>132</sup> The representative of *Finland* mentioned specifically Bases Nos. 8, 4, 9 and 24 (see League of Nations, *Acts of the Conference ...* (*op. cit.*), p. 58).

<sup>133</sup> *Ibid.*, p. 62.

Tribunals) state that a State is responsible for damage suffered by a foreigner as the result of the fact, *inter alia*, that there has been "unconscionable delay" on the part of the courts or that the substance of judicial decision has "manifestly been prompted by ill-will" toward foreigners as such or as subjects of a particular State (Basis of discussion No. 5)<sup>134</sup> as well as if the damage suffered by a foreigner is the result of the courts following a procedure and rendering a judgement "vitiating by faults so gross" as to indicate that they did not offer the guarantees indispensable for the proper administration of justice (Basis of discussion No. 6).<sup>135</sup> Article 9 concerning State responsibility for wrongful acts of the judiciary, adopted in first reading by the Third Committee of the Conference,<sup>136</sup> uses expressions such as "clearly incompatible with the international obligations of the State", "unjustifiable obstacles" and "delays implying a refusal to do justice".<sup>137</sup> The final paragraph of the article provides for a period of two years after the judicial decision for has been given for the presentation of a diplomatic claim "unless it is proved that special reasons exist which justify extension of this period".

64. With regard to other specific questions, such as whether the State incurs responsibility if, by a legisla-

<sup>134</sup> *Yearbook ... 1956*, vol. II, p. 223, document A/CN.4/96, annex 2. In this connexion, for example the reply by *Poland* to point IV, 1–4 (Basis No. 5) states that "... international responsibility is not involved if the decision, although unjust in itself and irreconcilable with international obligations, was simply the result of a mistake on the part of the tribunal, an occurrence that is inevitable in the judicial practice of any national courts acting in perfect good faith" (League of Nations, ... *Bases of Discussion ...* (*op. cit.*), p. 46); the reply by *Switzerland* to the same point pointed out that "a judicial decision inspired by malice toward foreigners as such or as nationals of a given State strikes a blow at the principle of the judicial protection due to foreigners ... the decision in question would be an act contrary to international law and would thus involve the responsibility of the State" (*ibid.*, p. 48); and the reply by the *United States of America* to that point states that "the State is not responsible for errors of national courts in the interpretation of municipal law, in the absence of fraud, corruption, or wilful injustice" (League of Nations, *Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, Supplement to vol. III* (C.75(a).M.69(a).1929.V), p. 11).

<sup>135</sup> *Yearbook ... 1956*, vol. II, p. 223, document A/CN.4/96, annex 2.

<sup>136</sup> *Ibid.*, p. 226, annex 3.

<sup>137</sup> The provisions embodied in article 9 distinguish between breaches of international obligations resulting from "judicial decisions" and breaches of international obligations resulting from "judicial proceedings". Referring to the latter, the representative of the *United Kingdom* stated

"It is a very difficult allegation to prove and one which cannot be lightly made. Still, there are cases where it happens. I will only give one instance which occurred a long while ago ... A ship coming into a port of a certain country, when entering the harbour, upset a little boat containing a couple of people rowing in the harbour. It was a pure accident and the navigating officer of the ship may or may not have been negligent, but that officer was arrested when he came on shore and prosecuted for murder; that is to say, he was prosecuted for the deliberate intention of killing two people in a boat which he never saw, never had seen and could have had no possible intention of harming at all. He was tried and ultimately the supreme court quashed the charge, but on that disgraceful accusation he remained for many months in prison under trying conditions" (League of Nations, *Acts of the Conference ...* (*op. cit.*), pp. 107 and 108).

tive act (point III, 4) or by an executive act (point V, 1(b)), it repudiates, suspends or modifies debts contracted with foreigners, certain Governments suggested that the answer in any given case would depend on the circumstances, and some of them made a reservation with regard to the case of "distress". The following passages from the reply of *South Africa* to those points are a good illustration of such a position:

Such action would *prima facie* constitute a breach of its international duties and give rise to an international claim. It would certainly entail international responsibility if a State, able to meet its liabilities, in repudiating the debts it owes to foreigners, was prompted by lack of consideration for their rights.

The Union Government would not, however, exclude the possibility of such repudiation being a justifiable act. Foreigners lending money to a particular State can hardly expect not to be prejudicially affected under any circumstances by the vicissitudes of the State in question. If, through adverse circumstances beyond its control, a State is actually placed in such a position that it cannot meet all its liabilities and obligations, it is virtually in a position of distress. It will then have to rank its obligations and make provision for those which are of a more vital interest first. A State cannot, for example, be expected to close its schools and universities and its courts, to disband its police force and to neglect its public services to such an extent as to expose its community to chaos and anarchy merely to provide the money wherewith to meet its moneylenders, foreign or national. There are limits to what may be reasonably expected of a State in the same manner as with an individual. If, in such a contingency, the hardships of misfortune are equitably divided over nationals as well as foreigners and the latter are not specially discriminated against, there should be no reason for complaint.<sup>138</sup>

The reply by *Austria* to the questions raised under point III, 4 contains an express reference to *force majeure*. It reads as follows:

The dominant doctrine of international law does not seem to qualify the repudiation of debts by the State as a violation of that State's international obligations unless the State acts arbitrarily—for instance, diverts from their proper destination the securities earmarked for its creditors. On the other hand, this doctrine does not admit that States whose nationals have been injured by such repudiation may intervene on behalf of the injured persons in cases in which repudiation has not been arbitrary, but has been necessitated by *vis major*. It must be allowed that, in most cases, the risks involved in acquiring the securities of a State whose financial situation is unstable are already counterbalanced by the price of issue or rate of interest. It is also evident that a State which refuses to pay alleged debts for reasons of a juridical order is not acting arbitrarily.

The proposed codification should, in the opinion of the Federal Government, be based on the above doctrine.<sup>139</sup>

The Bases of discussion drawn up by the Preparatory Committee in the light of the replies received from Governments to the above-mentioned points III, 4 and V, 1 (b) made a distinction between repudiation of debts pure and simple and the suspension or modification of the service of a debt. With regard to the latter, it is stated that a State incurs responsibility if it suspends or modifies the service by a legislative act (Basis of discussion No. 4)<sup>140</sup> or if the executive

power fails to comply with the obligations resulting from a State debt (Basis of discussion No. 9), "unless it is driven to this course by *financial necessity*"<sup>141</sup>

65. So far as the enactment of legislation and executive acts of a general character incompatible with the terms of *concessions* granted or *contracts* made by the State with a foreigner or of a nature to obstruct their execution is concerned, Bases of discussion Nos. 3 and 8 drawn up by the Preparatory Committee in the light of the replies received from Governments to points III, 2, and V, 1 (a), of the list, provide that "it depends upon the circumstances" whether the State incurs responsibility.<sup>142</sup> The reply by *Denmark*, for example, pointed out that:

The authorities are also sometimes obliged to take action out of respect for public health or security, decency or public order, without the concessionaire or the other party to the contract being entitled to claim compensation in respect thereof.<sup>143</sup>

In the reply by the *United States of America*, it is stated that the right of a nation "to exercise its police powers remains unimpaired"<sup>144</sup> but, at the same time, it is recalled that the United States "has [intervened] diplomatically in cases involving the arbitrary or confiscatory annulments of concessions or contracts".<sup>145</sup> Some Governments underlined in this respect the principle of equality as between nationals and foreigners. Thus, for instance, the reply by *Canada* stated that "the [State] liability arises only if the circumstances are such as would not justify the rescission of a contract between nationals of the State".<sup>146</sup> Other Governments pointed out that the responsibility of the State would only be involved if the conduct of the legislative or executive authorities was at variance with fundamental obligations of a civilized State vis-à-vis the foreigner as generally recognized in international law.<sup>147</sup>

66. Bases of discussion Nos. 3 and 8 (concessions or contracts) and Nos. 4 and 9 (debts) were not considered by the Third Committee of the Conference. Some proposals and amendments thereto were, however, submitted by participating countries. Thus, *Portugal* indicated—in connexion with bases of discussion Nos. 4 and 9—the need to take into account that "in *extreme circumstances* a State may find itself in an exceptional situation where sacrifices must be

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

<sup>143</sup> League of Nations, ... *Bases of discussion ... (op. cit.)*, p. 56. *Belgium* also indicated that:

"No exact answer can be given to the question ... a law on pensions, for example, might, by raising the cost of labour, obstruct the execution of a concession previously granted, but it would be inadmissible that the State should become responsible owing to the fact that the concession was granted to foreigners." (*Ibid.*, p. 31.)

<sup>144</sup> League of Nations, ... *Supplement to vol. III (op. cit.)*, p. 8.

<sup>145</sup> *Ibid.*, p. 13.

<sup>146</sup> *Ibid.*, p. 2. See also *Hungary* (League of Nations, ... *Bases of Discussion ... (op. cit.)* p. 31), *Switzerland* (*ibid.*, p. 32) and *Czechoslovakia* (*ibid.*, pp. 33 and 58).

<sup>147</sup> See, for instance, *Austria* (*ibid.*, p. 30) and *Poland* (*ibid.*, p. 32).

<sup>138</sup> League of Nations, ... *Bases of Discussion ... (op. cit.)*, pp. 37 and 59.

<sup>139</sup> *Ibid.*, p. 38.

<sup>140</sup> *Yearbook ... 1956*, vol. II, p. 223, document A/CN.4/96, annex 2.

borne by *nationals and foreigners alike*".<sup>148</sup> *Japan*, on the other hand, proposed the amendment of the second paragraph of those two Bases by the addition, at the end, of the words: "... by financial necessities, such as a moratorium, which are deemed to be urgent and unavoidable in consequence of disasters, calamities or wholly exceptional events, and of which the duration must be limited and reasonable".<sup>149</sup>

67. Some Governments referred also to the "circumstances" of the case in their replies to point V, 1 (d) relating to "unwarrantable" deprivation of a foreigner of his *liberty*.<sup>150</sup> In the reply by *Poland*, it is stated:

Despite these various precautionary measures, unjust cases of arrest due to mistakes on the part of the authorities cannot be entirely avoided. A foreigner may also be exposed to the risk of acts of the authorities which, though legal in form, are really unjust, provided that he is given an opportunity of defending himself in accordance with the law of the country in question and is entitled to claim compensation when the law admits such a claim; if it has fulfilled these duties, the State is exempt from responsibility. The State might be held to incur international responsibility when it is manifest from the circumstances that the unjust arrest of a foreigner is due exclusively to his foreign nationality, or the authorities have dealt unfavourably with his claim for compensation or satisfaction for that same reason. The State, which has power in general to expel a foreign national from its territory, has no more right to deprive him of his liberty while he is in the country than to attack any of his other fundamental rights.<sup>151</sup>

Basis of discussion No. 11, drawn up by the Preparatory Committee, which took account of the replies from Governments to the relevant point of the list, uses such expressions as "manifestly unnecessary" and "unduly prolonged" [detention], [imprisonment] "without adequate reason" and "causing unnecessary suffering" in connexion with the determination of acts to be considered particularly "unwarrantable".<sup>152</sup> Some of these expressions were also used in amendments thereto submitted to the Conference.<sup>153</sup> The Third Committee of the Conference did not consider Basis of discussion No. 11.

68. Failure of the State to show "such diligence as, having regard to the circumstances, could be expected from a civilized State", was the basis standard followed in Bases of discussion Nos. 10, 17 and 18<sup>154</sup> to determine the international responsibility of the State for *insufficient protection* afforded to foreigners

in case of damage caused by a private individual. That standard was retained by the Preparatory Committee in the light of the replies received from Governments to points V, 1 (c) and VII (a) and (b). The Committee summarized these replies as follows:

The replies show that a State incurs responsibility if the Government fails to exercise due diligence in protecting the foreigners. The following points emerge in the replies: the degree of diligence to be attained is such as may be expected from a civilized State; the diligence required varies with the circumstances; the standard cannot be the same in a territory which has barely been settled and in the home country; the standard varies according to the persons concerned, in that the State has a special duty of vigilance and has therefore a greater responsibility in respect of persons invested with a recognized public status. The protection which is due is mainly protection against crime.<sup>155</sup>

69. Those Bases of discussion were considered together by the Third Committee of the Conference. After lengthy discussions, the text finally adopted by a majority vote of 21 to 17, with 2 abstentions, was embodied in article 10. It provides that, as regards damage caused to foreigners or their property by private persons, the State is only responsible where the damage results from the fact that the State has failed to take such measures "as in the circumstances should normally have been taken" to prevent, redress, or inflict punishment for the acts causing the damage.<sup>156</sup> Other standards were also suggested in this respect during the consideration of the matter. For instance, it was proposed to replace "normally" by "reasonably" or by "properly". The "national treatment standard" was also proposed in a text submitted by *China* which was rejected in the Third Committee by 23 votes to 17.<sup>157</sup> The consideration of Bases Nos. 10, 17 and 18 and the adoption of article 10 may be characterized as the great crises of the Conference, in so far as the question of responsibility of States for damage caused in their territory to the person or property of foreigners is concerned.

70. The question of "fault" was referred to by some delegations during the debate on Bases Nos. 10, 17 and 18,<sup>158</sup> and *force majeure* was expressly mentioned by certain representatives, although not necessarily in support of the same views. Speaking in favour of the adoption of the "normal standard of diligence to be expected from a civilized State", the representative of *Finland* said that in the case

<sup>148</sup> League of Nations, *Acts of the Conference ... (op. cit.)*, p. 227.

<sup>149</sup> *Ibid.*, p. 222.

<sup>150</sup> For instance, *Austria* (League of Nations, ... *Bases of Discussion ... (op. cit.)*, p. 67, *Belgium (ibid.)*, *United Kingdom (ibid.)*, p. 68) and *Netherlands (ibid.)*. In the reply by the *United States of America*, it is stated that "in time of war, arrests on suspicion have been held not to make the State responsible." (League of Nations, ... *Supplement to vol. III (op. cit.)*, p. 14.)

<sup>151</sup> League of Nations, ... *Bases of Discussion ... (op. cit.)*, p. 69.

<sup>152</sup> *Yearbook ... 1956*, vol. II, p. 224, document A/CN.4/96, annex 2.

<sup>153</sup> See, for example, amendment by *Japan*, *Norway* and the *United Kingdom* (League of Nations, *Acts of the Conference ... (op. cit.)*, pp. 222, 225 and 217).

<sup>154</sup> *Yearbook ... 1956*, vol. II, p. 224, document A/CN.4/96, annex 2.

<sup>155</sup> League of Nations, ... *Bases of Discussion ... (op. cit.)*, pp. 67 and 96.

<sup>156</sup> *Yearbook ... 1956*, vol. II, p. 226, document A/CN.4/96, annex 3. The adopted text was based on a proposal made by the *Greek*, *Italian*, *British*, *United States* and *French* delegations (see League of Nations, *Acts of the Conference ... (op. cit.)*, p. 175). The result of the vote was as follows: *In favour*: Australia, Austria, Belgium, Canada, Estonia, Finland, France, Germany, Great Britain, Greece, India, Irish Free State, Italy, Japan, Netherlands, Norway, South Africa, Spain, Sweden, Switzerland, United States of America; *Against*: Brazil, Chile, China, Colombia, Czechoslovakia, Free City of Danzig, Hungary, Mexico, Nicaragua, Persia, Poland, Portugal, Romania, Salvador, Turkey, Uruguay, Yugoslavia; *Abst.*: Denmark, Latvia (*ibid.*, p. 190).

<sup>157</sup> *Ibid.*, p. 185.

<sup>158</sup> See, for instance, the letter addressed to the Chairman of the Third Committee by the representative of *Mexico (ibid.)*, p. 224).



... of a State which is not by accident placed in an irregular position, but which intentionally applies at home a general régime incompatible with the proper application of preventive or punitive measures ... there would be no question of *force majeure*, nor would the circumstances be abnormal; the whole structure of the State would be such that foreigners might not be able to claim proper measures of protection. The expression "the diligence which may be expected from a civilized State" would have furnished an objective criterion ... The words "having regard to the circumstances" cover any irregular situation which arises by accident.

No account, however, is taken of the cases where the internal order existing in a State is due to the régime generally applied ...<sup>159</sup>

On the other hand, the representative of *China*—who, as indicated above, had proposed as a standard "the treatment accorded to a nation's own nationals"—criticized the expression "the measures which should normally have been taken" on the following grounds:

... It is therefore a test of normality, and I submit that this is a test to which no country could subject itself. Take even the most highly organized countries in point of peace and order; even in those countries, there must be times of stress—whether human, whether of *force majeure*—there must be abnormal times in which [they] cannot be expected to take measures such as would be taken normally ...<sup>160</sup>

71. Basis of discussion No. 19 specifies that *the extent* of the State's responsibility, in cases of claims resulting from alleged *insufficient protection* afforded to foreigners, depends upon "all the circumstances" and, in particular, upon whether the act of the private individual was directed against a foreigner as such and upon whether the injured person has adopted a provocative attitude.<sup>161</sup> In summing up the relevant replies from Governments—replies to point VII, (c) and (d) of the list—the Preparatory Committee made the observation that some Governments think it necessary to take account of the fact that, whereas the hostility felt for a particular group of persons may sometimes outrun the anticipations of the public authority, whose responsibility *may thus be attenuated or eliminated*,\* the case will be quite different if the feeling of hostility was so widespread among a considerable part of the population that it could not have escaped the notice of the public authority, which, accordingly, ought to have taken precautions".<sup>162</sup> The Third Sub-Committee of the Third Committee of the Conference considered Bases of discussion Nos. 19 and 29 (compensation for damage) and recommended the deletion of Basis No. 19. The Third Committee unanimously decided to omit

<sup>159</sup> *Ibid.*, p. 185.

<sup>160</sup> *Ibid.*, p. 186.

<sup>161</sup> *Yearbook ... 1956*, vol. II, p. 224, document A/CN.4/96, annex 2.

<sup>162</sup> League of Nations, ... *Bases of Discussion ... (op. cit.)*, 102. Basis of discussion No. 20 dealing with the consequences which may follow from a decision by the State (act of indemnity, amnesty, other similar measures) putting an end to the injured foreigner's right to obtain reparation from the author of the damages—provided that in those cases the State concerned renders itself responsible for the damages "to the extent to which the author of the damage was responsible" (*Yearbook ... 1956*, vol. II, p. 224, document A/CN.4/96, annex 2).

Basis No. 19, as recommended. The fact that the "extent" of the State's responsibility depends upon all the circumstances was self-evident, and it was therefore unnecessary to mention it; this was one of the reasons advanced for the deletion.<sup>163</sup>

72. Finally, with respect to damage resulting from *insurrection, riots or other disturbances*—a question in connexion with which *force majeure* has been frequently referred to<sup>164</sup>—Bases of discussion Nos. 21 and 22,<sup>165</sup> as revised by the Preparatory Committee (points VIII and IX of the list),<sup>166</sup> set forth the principle that the State is not responsible for the damage caused to foreigners (a) by State officials in the course of the suppression of an insurrection, riot or other disturbance<sup>167</sup> or (b) by persons taking part in an insurrection, riot or mob violence. The reply from the *United Kingdom* to point VIII is of particular interest in this regard. It reads as follows:

The State is not, as a general rule, responsible for losses or injuries suffered by a foreigner which are inflicted unintentionally by the authorities or armed forces of the State in the course of suppressing an insurrection, a riot or an attack of mob violence. Compensation must be paid for the property of a foreigner appropriated or intentionally destroyed in the course of such operations, but not for property destroyed or injured unintentionally, unless, in the latter case, there is some provision in the municipal law which provides for the payment of compensation, in which case the right to compensation is governed by the provisions of such municipal law.

The above principle would not apply, and the State would be responsible for losses or injuries suffered by foreigners in the course of the suppression of an insurrection, a riot or an attack of mob violence if the conduct of the authorities or armed forces was manifestly inconsistent with the general standard observed by civilized States, or if the acts complained of were manifestly in excess of the necessities of the case.<sup>168</sup>

73. In the case of damage caused to foreigners by persons taking part in an insurrection, riot or mob violence, the principle of non-responsibility of the State is qualified by the provisions contained in Bases of discussion No. 22 (a) to (d).<sup>169</sup> For instance, Basis of discussion No. 22 (a) states that the State is responsible "if it failed to use such diligence as was due in the circumstances in preventing the damage and punishing its authors" and Basis of discussion

<sup>163</sup> League of Nations, *Acts of the Conference ... (op. cit.)*, pp. 130 and 235.

<sup>164</sup> The report of the Sub-Committee of the Committee of Experts for the Progressive Codification of International Law, prepared by the Rapporteur, Mr. Guerrero, and Mr. Wang Chung-hui (C.46.M.23.1926.V) refers expressly to *force majeure* in the considerations devoted to damage caused to foreigners in cases of riot and civil war. See paras. 538–548 below.

<sup>165</sup> *Yearbook ... 1956*, vol. II, p. 224, document A/CN.4/96, annex 2.

<sup>166</sup> League of Nations, ... *Bases of Discussion ... (op. cit.)*, pp. 104–111; and ... *Supplement to vol. III (op. cit.)*, pp. 3 and 19–21.

<sup>167</sup> Some replies pointed out that the State performs a duty in suppressing disturbances.

<sup>168</sup> League of Nations, ... *Bases of Discussion ... (op. cit.)*, p. 105. The idea that nevertheless the State should make good damage in certain cases, in particular if its officials cause unnecessary damage, was incorporated by the Preparatory Committee in Basis of discussion No. 21.

<sup>169</sup> *Yearbook ... 1956*, vol. II, p. 224, document A/CN.4/96, annex 2.



No. 22 (d) that the State is responsible "if the movement was directed against foreigners as such, or against persons of a particular nationality, unless the Government proves that there was no negligence on its part or on the part of its officials". Lack of "due diligence" is here again the standard followed by the Bases of discussion for determining any eventual international responsibility of the State.

74. The subject of State responsibility for damage caused to the person or property of aliens has been a matter of concern within the *Inter-American system* from its very inception. The First International American Conference (Washington, 1889-1890) adopted a recommendation concerning "claims and diplomatic intervention", which proclaimed the principle of the civil equality of the foreigner with the national as the maximum limit of protection.<sup>170</sup> Such a principle was also embodied in the *Convention relative to the Rights of Aliens, signed at the Second International Conference of American States* (Mexico City, 1902), article 2 of with states, *inter alia*, that:

... the States are not responsible for damages sustained by aliens through acts of rebels or individuals, and in general, for damages originating from *fortuitous causes of any kind*,\* considering as such the acts of war, whether civil or national; except in the case of failure on the part of the constituted authorities to comply with their duties.<sup>171</sup>

The resolution on "International responsibility of the State", adopted at the Seventh International Conference of American States (Montevideo, 1933), reaffirmed again the equal treatment principle referred to above. At the same time, the Conference recognized that general principles "may be the subject of definition or limitations" and that the agencies charged with planning the codification "shall take into account the necessity of definition and limitations" in formulating the rules applicable to the various cases which might be provided for.<sup>172</sup>

75. Principle 5 of the "*Principles of international law that govern the responsibility of the State in the opinion of Latin American countries*", prepared by the *Inter-American Juridical Committee in 1962*, states that damages suffered by aliens as a consequence of disturbances or commotion of a political or social nature and injuries caused to aliens by acts of private parties create no responsibility of the State, "except in the case of the fault of duly constituted authorities"; principle 6 adds that "the theory of risk" as the basis for international responsibility is not admissible.<sup>173</sup> The "*Principles of international law that govern the responsibility of the State in the*

*opinion of the United States of America*", prepared by the *Inter-American Juridical Committee in 1965*, adopt as a general standard of responsibility the principle of the "minimum standard of rights determined by international law". Principle VIII, entitled "Circumstances in which a State is entitled to disclaim responsibility", recognizes that there are "factual circumstances" that permit a State to disclaim responsibility.<sup>174</sup>

#### (d) Law of treaties

76. From the standpoint of the law of treaties, *force majeure* and "fortuitous event" are mainly regarded as cases of supervening impossibility of performance of treaty obligations. Supervening impossibility of performance, including impossibility in the nature of *force majeure*, is frequently listed among the circumstances justifying temporary non-performance of a treaty obligation through the operation of a general rule of international law.<sup>175</sup> Once the obstacle represented by the impossibility of performance or by *force majeure* is removed, performance of the treaty obligation must be resumed, otherwise the State concerned will incur international responsibility for non-fulfilment of the treaty obligation in question. Supervening impossibility of performance, including impossibility due to *force majeure*, is also, in the law of treaties, one of the grounds for terminating or suspending the operation, *in toto* or in part, of the treaty itself.

#### VIENNA CONVENTION ON THE LAW OF TREATIES (1969)

77. Thus the International Law Commission included an article in its *draft articles on the law of treaties*<sup>176</sup> adopted in 1966 article 58, entitled "Supervening impossibility of performance" and worded as follows:

A party may invoke an impossibility of performing a treaty as a ground for terminating it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

<sup>174</sup> *Ibid.*, p. 154, annex XV.

<sup>175</sup> See, for instance, article 14 in the fourth report submitted in 1959 to the International Law Commission by Sir Gerald Fitzmaurice (*Yearbook ... 1959*, vol. II, pp. 44, 45 and 64, document A/CN.4/120).

<sup>176</sup> *Yearbook ... 1966*, vol. II, pp. 255-256, document A/6309/Rev.1, part II, chap. II, draft articles on the law of treaties with commentaries, art. 58. For the legislative history of this article, see article 21 in the second report of Sir Humphrey Waldock (*Yearbook ... 1963*, vol. II, pp. 77-79, document A/CN.4/156 and Add.1-3), article 43 of the Commission's 1963 draft (*ibid.*, pp. 206-207, document A/5509, chap. II, sect. B) and article 43 in the fifth report of Sir Humphrey Waldock (*Yearbook ... 1966*, pp. 37-39, document A/CN.4/183 and Add.1-4). See also articles 16 and 17 in the second report of Sir Gerald Fitzmaurice (*Yearbook ... 1957*, vol. II, pp. 28-29 and 49-52, document A/CN.4/107).

<sup>170</sup> *Ibid.*, p. 226, annex 4.

<sup>171</sup> *Ibid.*, annex 5. The project on "Diplomatic protection" prepared in 1925 by the American Institute of International Law states that every nation has the right to accord diplomatic protection to its nationals in an American republic "in cases in which they do not have legal recourse to the authorities of the country, or if it can be proved that there has been denial of justice by the said authorities, undue delay, or a violation of the principles of international law" (*ibid.*, p. 227, annex 7).

<sup>172</sup> *Ibid.*, annex 6.

<sup>173</sup> *Yearbook ... 1969*, vol. II, p. 153, document A/CN.4/217 and Add.1, annex XIV.

Paragraph 3 of the Commission's commentary on the article explains the provision set forth in the second sentence of the text in the following terms:

(3) The article further provides that, if the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty. The Commission appreciated that such cases might be regarded simply as cases where *force majeure* could be pleaded as a defence exonerating a party from liability for non-performance of the treaty. But it considered that, when there is a continuing impossibility of performing recurring obligations of a treaty, it is desirable to recognize, as part of the law of treaties, that the operation of a treaty may be suspended temporarily.

78. At the *United Nations Conference on the Law of Treaties* (Vienna, 1968–1969), the delegation of *Mexico* submitted an amendment to the above-mentioned article 58 of the Commission's draft, rewording the article as a whole to read as follows:

A party may invoke *force majeure* as a ground for terminating a treaty when the result of the *force majeure* is to render permanently impossible the fulfilment of its obligations under the treaty. If the impossibility is temporary, the *force majeure* may be invoked only as a ground for suspending the operation of the treaty.<sup>177</sup>

Introducing his amendment in the Committee of the Whole, in 1968, the representative of *Mexico* said that:

2. ... in article 58 the International Law Commission had dealt with a particular case of *force majeure*, that of the disappearance or destruction of an object indispensable for the execution of the treaty. The very wide definition of a treaty given in article 2 covered a great variety of treaties, including those of a commercial or financial character, the performance of which might come up against many other cases of *force majeure*. He was thinking, in particular, of the impossibility [of delivering] an article by a given date owing to a strike, the closing of a port or a war, or of the possibility that a rich and powerful State, faced with temporary difficulties, might be obliged to suspend its payments. In such cases, the law should establish the rights of the parties and not rely on their mutual good will.

3. *Force majeure* was a well-defined notion in law; the principle that "no person is required to do the impossible" was both a universal rule of international law and a question of common sense. Its application had not caused courts any special difficulties and it was unnecessary to draw up a list of the situations covered by that rule.

4. According to paragraph 3 of the International Law Commission's commentary on the article, such cases might be regarded simply as cases in which *force majeure* could be pleaded as a defence exonerating a party from liability for non-performance of the treaty. But not to incur responsibility for an act or its omission was to have the right of performance or non-performance of an act. If in the case of *force majeure* a State did not incur any responsibility, that was because so long as *force majeure* lasted, the treaty must be considered suspended.

5. If the notion of *force majeure* belonged not to the law of treaties but to the doctrine of responsibility, article 58 would not have a place in the draft convention. His delegation was of the opinion that a principle so important as that of *force majeure* should be included in the draft and should not be reduced to a particular case of which the practice of States furnished few examples.<sup>178</sup>

<sup>177</sup> *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 182, document A/CONF.39/14, para. 531 (a).

<sup>178</sup> *Ibid.*, First session, *Official Records, Summary records of the plenary meetings and of the meetings of the Committee of the Whole*

79. The representative of *Cuba* favoured the Mexican amendment, but thought it necessary to take account of the specific case mentioned in article 58, namely, that the object in question must be one that was indispensable for the execution of the treaty and one whose absence, when established, would have immediate effect on the validity of the treaty.<sup>179</sup> The representative of *Bulgaria* considered that the amendment should be referred to the Drafting Committee, even if only to allow it to express an opinion on the necessity or advisability of expressly introducing the notion of *force majeure*. In his opinion, article 58 properly confined itself to circumstances of *force majeure*, but solely within the limits prescribed by the text of the draft article.<sup>180</sup> The representatives of the *Congo*, *France*, *Poland*, the *USSR* and the *United States of America* spoke against redrafting the article along the lines proposed in the Mexican amendment. Thus, the representative of the *United States of America* said that the expression "impossibility of performance" amply covered the notion of *force majeure* and that the expression "*force majeure*" lacked precision.<sup>181</sup> For the representative of the *Soviet Union*, the notion of *force majeure*, as understood in the internal law of certain countries had not been clearly defined and had no precise meaning in international law. In his view, recourse to analogies taken from internal law should be avoided, particularly in international law.<sup>182</sup> The representative of *Poland* also stated that the notion of *force majeure* would introduce into the article an element of internal law hitherto foreign to international law.<sup>183</sup> Finally, the representative of *France* expressed himself in the following terms with regard to the Mexican amendment:

... Article 58 dealt with a specific case of *force majeure*: one in which the disappearance or destruction of an object indispensable for the execution of a treaty could be objectively ascertained. The Mexican amendment, on the other hand, proposed that all cases of *force majeure* should be covered. The notion of *force majeure* was well known in internal law because many years of judicial practice had helped to define it and make it clear. His delegation was not convinced that the notion was equally clear in international law, and feared that its inclusion in article 58 would broaden the scope of the article and make its application more difficult. He thought it preferable therefore to confine the idea of *force majeure* to the case covered by article 58.<sup>184</sup>

80. At the request of the Mexican representative, the Mexican amendment was not put to the vote.<sup>185</sup> The Committee of the Whole, and later the Conference in plenary, adopted the text proposed by the

(United Nations publication, Sales No.E.68.V.7), pp. 361 and 362, Sixty-second meeting of the Committee of the Whole, paras. 2–5. The representative of Mexico, Mr. Suárez, had also represented his country at the 1930 Hague Conference for the Codification of International Law.

<sup>179</sup> *Ibid.*, p. 363, para. 24.

<sup>180</sup> *Ibid.*, para. 20.

<sup>181</sup> *Ibid.*, para. 16.

<sup>182</sup> *Ibid.*, p. 364, para. 34.

<sup>183</sup> *Ibid.*, para. 28.

<sup>184</sup> *Ibid.*, para. 27.

<sup>185</sup> *Ibid.*, p. 365, para. 44.

International Law Commission as amended by an amendment submitted by the *Netherlands*.<sup>186</sup> The text, which is embodied in article 61 of the 1969 Vienna Convention on the Law of Treaties,<sup>187</sup> was adopted by 99 votes to none by the conference in 1969,<sup>188</sup> and reads as follows:

*Supervening impossibility of performance*

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

It should be noted that "supervening impossibility of performance" as a ground for terminating, withdrawing or suspending the operation of a treaty may be invoked only with respect to some clauses of the treaty concerned, as provided for in article 44 (Separability of treaty provisions) of the 1969 Vienna Convention.

**(e) Diplomatic and consular law**

VIENNA CONVENTION ON DIPLOMATIC RELATIONS (1961)

81. Article 40 of the Vienna Convention on Diplomatic Relations,<sup>189</sup> of 18 April 1961, sets forth the duties of a third State in case of passage through its territory of a diplomatic agent while proceeding to take up or to return to his post, and of his family, of members of the administrative and technical staff and members of their families, and of diplomatic couriers and diplomatic bags and official correspondence and other official communications in transit. Paragraphs 1 to 3 of the article provide for inviolability and other immunities to be accorded in such cases by a third State which has granted the person concerned a "passport visa if such visa was necessary", the latter requirement having been inserted by the United Nations Conference on Diplomatic Intercourse and Immunities in the corresponding draft article (art. 39) submitted by the International Law Commission.<sup>190</sup> Following that insertion, the Confer-

ence added a new paragraph 4 to the article, according to which

the obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and diplomatic bags, whose presence in the territory of the third State is due to "force majeure".<sup>191</sup>

OTHER CODIFICATION CONVENTIONS

82. A similar provision may be found in other codification conventions relating to diplomatic and consular law adopted subsequently, such as the *Vienna Convention on Consular Relations*,<sup>192</sup> of 24 April 1963 (article 54), the *Convention on Special Missions*,<sup>193</sup> of 8 December 1969 (article 42), and the *Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character*<sup>194</sup> of 14 March 1975 (article 81).

**(f) Law of the sea**

CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE (1958)

83. Article 15, paragraph 1, of the Convention on the Territorial Sea and the Contiguous Zone,<sup>195</sup> of 29 April 1958, adopted at the first United Nations Conference on the Law of the Sea (Geneva, 24 February–27 April 1958), provides that "the coastal State must not hamper innocent passage through the territorial sea". The right of innocent passage includes, according to paragraph 3 of article 14 of the Convention, "stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress".<sup>196</sup>

<sup>191</sup> See the amendment by the *Netherlands*, reintroduced by *Portugal* (*Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II (United Nations publication, Sales No. 62.XI.1), p. 67, document A/CONF.20/L.2, para. 198, *in fine*). In introducing the amendment, the representative of the *Netherlands* said that a diplomatic agent sometimes found himself unexpectedly in the territory of a third State, for example, when an aeroplane in which he was travelling was diverted (*ibid.*, vol. I (United Nations publication, Sales No. 61.X.2), p. 209, thirty-fifth meeting of the Committee of the Whole, para. 32).

<sup>192</sup> United Nations, *Treaty Series*, vol. 596, p. 261.

<sup>193</sup> General Assembly resolution 2530 (XXIV), annex.

<sup>194</sup> *Official Records of the United Nations Conference on the Representation of States in Their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207.

<sup>195</sup> United Nations, *Treaty Series*, vol. 516, p. 205.

<sup>196</sup> The provision follows the text of the corresponding article (art. 15) of the draft articles concerning the law of the sea adopted by the International Law Commission in 1956 (*Yearbook ... 1956*, vol. II, p. 258, document A/3159, chap. II, sect. II).

<sup>186</sup> *Ibid.*, *Documents of the Conference (op. cit.)*, p. 183, document A/CONF.39/14, para. 531(b).

<sup>187</sup> *Ibid.*, p. 297.

<sup>188</sup> *Ibid.*, *Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), p. 116, Twenty-second plenary meeting, para. 6.

<sup>189</sup> United Nations, *Treaty Series*, vol. 500, p. 95.

<sup>190</sup> *Yearbook ... 1958*, vol. II, p. 103, document A/3859, chap. III, sect. II.

THIRD UNITED NATIONS CONFERENCE ON THE  
LAW OF THE SEA (1973)

84. States have undertaken recently, under the auspices of the United Nations, an over-all review of the law of the sea and the Third United Nations Conference on the Law of the Sea, now in progress, has been convened by the General Assembly following the preparatory work entrusted to the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction. Although it is too early to know the outcome of the work of the Third Conference on the Law of the Sea, it is not without interest, for the purposes of the present paper, to note that participating States have submitted several proposals referring expressly to *force majeure*. This was reflected in an informal single negotiating text submitted at the closing of the third session of the Conference (Geneva, 17 March–9 May 1975) by the Chairmen of its Main Committees.<sup>197</sup>

85. For instance, part II of the informal single negotiating text mentions *force majeure* in articles 15 (para. 2), 39 (para. 1), 114 (para. 1) and 125 (para. 1). Paragraph 2 of article 15 relating to the right of innocent passage in the territorial sea states that innocent passage includes stopping and anchoring but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.<sup>198</sup> Article 39, paragraph 1, concerning transit passage through straits used for international navigation, provides that ships and aircraft, while exercising the right of transit passage, shall, *inter alia*, “refrain from any activities other than those incidental to the normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress”. Article 125, paragraph 1, contains a similar provision for ships and aircraft exercising the right of archipelagic sea lanes passage. Finally, so far as land-locked States are concerned, article 114, paragraph 1, provides that “except in cases of *force majeure* all measures shall be taken by transit States to avoid delays in or restrictions on traffic in transit”. Paragraph 16 of annex I to part I of the informal single negotiating text<sup>199</sup> (Basic conditions of general survey, exploration and exploitation of the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction) provides that non-performance of contracts or delay in performance shall be excused if and to the extent that such non-performance or delay is caused by *force majeure*. At the fourth

<sup>197</sup> *Official Records of the Third United Nations Conference on the Law of the Sea, Third Session*, vol. IV (United Nations publication, Sales No. E.75.V.10), pp. 137 *et seq.*, document A/CONF.62/WP.8. The single negotiating text is informal in character and does not prejudice the position of any delegation nor represent any negotiated text or accepted compromise. In its preparation, account was taken, however, of the documents before the Conference and the official and unofficial consultations held during the sessions.

<sup>198</sup> *Ibid.*, pp. 152 *et seq.*, document A/CONF.62/WP.8/Part II.

<sup>199</sup> *Ibid.*, pp. 149 *et seq.*, document A/CONF.62/WP.8/Part I.

session of the Conference, the Chairmen of the Main Committees submitted a revised single negotiating text,<sup>200</sup> incorporating changes necessitated by the progress of negotiations since the end of the third session. No change in substance was made in the provisions mentioned above,<sup>201</sup> except that paragraph 16 of annex I to part I was removed from the revised text.<sup>202</sup>

(g) Communications and transit

STATUTE ON FREEDOM OF TRANSIT AND STATUTE CONCERNING THE RÉGIME OF NAVIGABLE WATERWAYS OF INTERNATIONAL CONCERN (1921)

86. The Statute on Freedom of Transit<sup>203</sup> and the Statute concerning the Régime of Navigable Waterways of International Concern,<sup>204</sup> both done on 20 April 1921 at the Conference convened at Barcelona under the auspices of the League of Nations, do not refer expressly to *force majeure*. Article 7 of the Statute on Freedom of Transit and article 19 of the Statute on the Régime of Navigable Waterways of International Concern allow, however, in exceptional cases and for as short a period as possible, measures of a general or particular character which a Contracting State is obliged to take “in case of an emergency affecting the safety of the State or the vital interests of the country”, even if such measures involve a deviation from the provisions embodied in those Statutes.<sup>205</sup>

87. Moreover, article 9 of the Statute on the Régime of Navigable Waterways of International Concern provides also that the Customs duties levied in ports situated on a navigable waterway of international concern on the importation or exportation of goods through the aforesaid ports must not be higher than those levied on the other Customs frontiers of the State interested, on goods of the same kind, source and destination, except in case of “special circumstances justifying an exception on the ground of economic necessities”.<sup>206</sup>

<sup>200</sup> *Official Records of the Third United Nations Conference on the Law of the Sea, Fourth Session*, vol. V (United Nations publication, Sales No. E.76.V.8), pp. 125 *et seq.*, document A/CONF.62/WP.8/Rev.1.

<sup>201</sup> See part II of the revised single negotiating text: *ibid.*, pp. 151 *et seq.*, document A/CONF.62/WP.8/Rev.1/Part II, art. 17, para. 2; art. 38, para. 1 (c); art. 126; and art. 115, para. 1.

<sup>202</sup> Subsequently to the issue of the present document in its mimeographed form, the informal single negotiating text and its revised versions were replaced by an “informal composite negotiating text” (*ibid.*, *Sixth Session*, vol. VIII (United Nations publication, Sales No. E.78.V.4), document A/CONF.62/WP.10).

<sup>203</sup> League of Nations, *Treaty Series*, vol. VII, p. 11.

<sup>204</sup> *Ibid.*, p. 35.

<sup>205</sup> These provisions, like others of the same kind recorded in the present paper, would seem to contemplate “state of emergency” rather than *force majeure*, but it is not altogether excluded that they could be invoked in situations amounting to *force majeure*.

<sup>206</sup> Article 16 of the Statute on the International Régime of Maritime Ports, done at Geneva on 9 December 1923 (*ibid.*, vol. LVIII, p. 285) contains a similar provision.

## OTHER CONVENTIONS

88. The *Convention on Facilitation of International Maritime Traffic*,<sup>207</sup> signed at London on 9 April 1965, states that nothing in the Convention shall be interpreted as precluding a contracting Government from applying "temporary measures" necessary to preserve public morality, order and security or to prevent the introduction or spread of diseases or pests affecting public health, animals or plants.

89. The *International Loadline Convention*,<sup>208</sup> signed at London on 5 July 1930, states, in its article 4, that

no ship which is not subject to the provisions of this Convention at the time of its departure on any voyage shall become subject to the provisions of this Convention on account of any deviation from its intended voyage due to stress of weather or any other cause of *force majeure*. In applying the provisions of this Convention, the Administration shall give due consideration to any deviation or delay caused to any ship owing to stress of weather or to any other cause of *force majeure*.<sup>209</sup>

The term "Administration" means, for the purpose of the Convention, the Government of the country to which the ship belongs.

90. The *Convention for the Protection of Submarine Cables*,<sup>210</sup> done at Paris on 14 March 1884, makes a punishable offence the breaking or injury of a submarine cable done wilfully or through culpable negligence, except "when the parties guilty thereof have become so simply with the legitimate object of saving their lives or their vessels, after having taken all necessary precautions to avoid such ruptures or injuries".

**(h) Protection of the environment**<sup>211</sup>

## INTERNATIONAL CONVENTION FOR THE PREVENTION OF POLLUTION OF THE SEA BY OIL (1954)

91. Article 4 of the International Convention for the Prevention of Pollution of the Sea by Oil,<sup>212</sup> done at London, on 12 May 1954, specifies that the prohi-

<sup>207</sup> United Nations, *Treaty Series*, vol. 591, p. 265.

<sup>208</sup> League of Nations, *Treaty Series*, vol. CXXXV, p. 301.

<sup>209</sup> Similar provisions are contained in other conventions, for example in article 7 of the 1966 International Convention on Load Lines (United Nations, *Treaty Series*, vol. 640, p. 133), the 1969 International Convention on Tonnage Measurement of Ships (IMCO publication, Sales No. IMCO.1970.1, p. 28) and the 1948 and 1960 International Conventions for the Safety of Life at Sea (United Nations, *Treaty Series*, vol. 164, p. 113 and vol. 536, p. 27).

<sup>210</sup> Nagendra Singh, *British Shipping Laws*, vol. 8 (International Conventions of Merchant Shipping), 2nd ed. (London, Stevens, 1973), p. 378.

<sup>211</sup> For liability régimes governing the protection of the maritime environment against oil pollution, see paras. 113–114 below.

<sup>212</sup> United Nations *Treaty Series*, vol. 327, p. 3. The Regulations annexed to the 1973 International Convention for the Prevention of Pollution from Ships (IMCO publication, Sales No. 74.01.E, p. 19) list also among the exceptions discharges of oil necessary for securing the safety of the ship or saving life at sea as well as those resulting from damage to the ships. See also the Convention on the Protection of the Marine Environment of the Baltic Sea Area,

bition of discharge or escape of oil from ships provided for by the Convention does not apply. *inter alia*, when the discharge is made "for the purpose of securing the safety of the ship, preventing damage to the ship or cargo, or saving life at sea" or when the escape results "from damage to the ship or unavoidable leakage, if all reasonable precautions have been taken after the occurrence of the damage or discovery of the leakage for the purpose of preventing or minimizing the escape".

## CONVENTION ON THE PREVENTION OF MARINE POLLUTION BY DUMPING OF WASTES AND OTHER MATTER (1972)

92. In accordance with the provisions of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,<sup>213</sup> done at London, Mexico City, Moscow and Washington on 29 December 1972, the Contracting Parties shall prohibit the dumping of any wastes or other matter in whatever form or condition, except as otherwise specified in the Convention. The prohibition of dumping does not apply, however, "when it is necessary to secure the safety of human life or of vessels, aircraft, platforms or other man-made structures at sea in cases of *force majeure* caused by stress of weather or in any case which constitutes a danger to human life or a real threat to vessels, aircraft, platforms or other man-made structures at sea, if dumping appears to be the only way of averting the threat and if there is every probability that the damage consequent upon such dumping will be less than would otherwise occur" (art. V).

**(i) Human rights**

## INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1966)

93. The expression "*force majeure*" does not appear either in the International Covenant on Economic, Social and Cultural Rights or in the International Covenant on Civil and Political Rights annexed to General Assembly resolution 2200 A (XXI) of 16 December 1966. Article 4 of the latter Covenant con-

done at Helsinki on 22 March 1974, and the Regulations annexed thereto (*National Legislation and Treaties relating to the Law of the Sea* (United Nations publication, Sales No. E/F.76.V.2), p. 518).

<sup>213</sup> *National Legislation and Treaties ... (op. cit.)*, p. 466. Similar provisions are contained in article 8 of the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, signed at Oslo, on 15 February 1972 (*ibid.*, p. 458) and in the Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft attached to the Convention for the Protection of the Mediterranean Sea against Pollution, done at Barcelona, on 16 February 1976 (United Nations Environment Programme, *Plan of Action for the Mediterranean and Final Act of the Conference of Plenipotentiaries of the Coastal States of the Mediterranean Region for the Protection of the Mediterranean Sea* (United Nations, New York, 1978), p. 43)

tains a general provision allowing in time of public emergency derogations from the obligations assumed under the Covenant. Paragraph 1 of the article reads as follows:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Paragraph 2 of the same article adds, however, that no derogation from articles 6 (inherent right to life), 7 (inhuman or degrading treatment or punishment), 8, paragraphs 1 and 2 (slavery and servitude), 11 (imprisonment for debts), 15 (freedom from *ex post facto* laws), 16 (right to juridical personality), and 18 (right to freedom of thought, conscience and religion) may be made under the provision of paragraph 1 quoted above.<sup>214</sup>

94. Rules concerning some rights set forth in the International Covenant on Civil and Political Rights,<sup>215</sup> and in the International Covenant on Economic, Social and Cultural Rights,<sup>216</sup> provide that the rights in question or their exercise may be subject to certain restrictions provided by law and necessary to protect national security, public order, public health or morals or the rights and freedoms of others.

#### (j) The law relating to armed conflicts

##### CONVENTION RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND (1907)

95. Article 3 of the Convention (IV) respecting the Laws and Customs of War on Land<sup>217</sup> of 18 October 1907, adopted at the Second International Peace Conference held at The Hague (15 June–18 October 1907)<sup>218</sup> states that:

... a belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

<sup>214</sup> Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (United Nations, *Treaty Series*, vol. 213, p. 221) under the auspices of the Council of Europe, and article 27 of the American Convention on Human Rights done at San José, Costa Rica, on 22 November 1969 contain a provision concerning derogations similar in nature to the one embodied in article 4 of the International Covenant on Civil and Political Rights.

<sup>215</sup> See, for example, articles 12, 14, 19, 21 and 22.

<sup>216</sup> See article 8.

<sup>217</sup> *Actes et documents de la Deuxième Conférence internationale de la paix* (La Haye, 15 juin–18 octobre 1907) (The Hague, Imprimerie nationale, 1907), vol. I, p. 626.

<sup>218</sup> Convened to complete and render more precise in certain particulars the work of the First Peace Conference, including the Convention and Regulations respecting the laws and customs of war on land of 26 July 1899.

The regulations referred to in the article are the “Regulations respecting the laws and customs of war on land”, annexed to the Convention.<sup>219</sup>

96. As it is well known, the formulation embodied in article 3 of the 1907 Fourth Convention has its origin in an amendment relating to indemnification for violation of the Regulations submitted to the Conference by the *German* delegation.<sup>220</sup> The introductory statement on the amendment, made by the German representative at the fourth meeting of the First Sub-Commission of the Second Commission of the Conference, explains the need, in the present context, for a rule on international responsibility such as the one proposed by his delegation, as follows:

One might perhaps question the necessity of providing for such a case, on the ground that it is not doubted that the signatory Powers of an international convention have every intention of conforming to the rules they have adopted.

I do not need to say that it has not entered our thoughts to question the good faith of the Governments. In fact, a rule governing the case of an infraction of conventional stipulations is out of the question if we are dealing with obligations whose execution depends upon the will alone of the Government. But this is not the case. According to the Convention respecting the Laws and Customs of War on Land, the Governments are under no other obligation than to give to their armed forces instructions in accordance with the provisions contained in the Regulations annexed thereto. Granting that these provisions must form a part of the military instructions, their infraction would come under the head of the penal laws which safeguard the discipline of the armies. However, we cannot pretend that this sanction is sufficient to prevent absolutely all individual transgression. It is not only the commanders of armies who have to conform to the provisions of the Regulations. These provisions are likewise applicable to all the officers, commissioned and non-commissioned, and to the soldiers. The Governments cannot therefore guarantee that the orders, which have been issued in accordance with their agreement, will be observed without exception during the course of the war.

Under these circumstances, it is proper to anticipate the consequences of infractions which might be committed against the requirements of the Regulations. According to a principle of private law, he who by an unlawful act, through intent or negligence, infringes the right of another, must make reparation to this other for the damage done. This principle is equally applicable in the domain of international law and especially in the cases in point. However, we cannot hold here to the theory of the subjective fault by which the State would be responsible only if a lack of care or surveillance were established against it. The case most frequently occurring will be that in which no negligence is chargeable to the Government itself. If in this case persons injured as a consequence of violation of the Regulations could not demand reparation from the Government and were obliged to look to the officer or soldier at fault, they would fail in the majority of cases to obtain the indemnification due them. We think therefore that the responsibility for every unlawful act committed in violation of the Regulations by persons forming part of the armed force should rest with the Governments to which they belong.<sup>221</sup>

97. It would seem, in the light of that statement, that the main purpose of the amendment was to lay down that international responsibility for the viol-

<sup>219</sup> J. B. Scott, *The Proceedings of The Hague Peace Conferences: The Conference of 1907*, vol. I (New York, Oxford University Press, 1920), pp. 623–631.

<sup>220</sup> *Ibid.*, vol. III, p. 139.

<sup>221</sup> *Ibid.*, pp. 139–140.

ation of the rules set forth in the Regulations arises "objectively", without there being any necessity to prove that the individual organs concerned were at fault or negligent. Frequently quoted and commented upon, article 3 of the 1907 Fourth Convention has been referred to subsequently as an example of the treaty provision embodying the principle of "absolute" responsibility. It is worth while to remember, in this connexion, that the substantive rules of the Regulations contain a series of "escape" provisos based on notions such as "military necessity". This feature of the primary rules concerned, the nature of the situation intended to be regulated, and the way in which they are supposed to be applied in practice, explain the wording of article 3 of the Convention. However, can article 3 be construed as establishing an "absolute" or "strict" responsibility of a kind excluding altogether the possibility of invoking, in any case, the defence of *force majeure*? Different views have been expressed on the matter.<sup>222</sup>

98. Paragraph 5 of the Declaration made on 18 December 1924 by the Government of *Finland*, at the time of its signature of the Protocol for the Pacific Settlement of International Disputes adopted by the Fifth Assembly of the League of Nations, would seem to imply that the defence of *force majeure* could be lawfully invoked in certain cases of alleged violations of the laws and customs of war. It read as follows:

A State which, in a given situation, unless absolutely compelled by *force majeure*, has violated the laws and customs of war will not escape responsibility for such violation. It is understood that, whether it has been declared an aggressor or not, it will not escape this responsibility as recognized in article 3 of the Convention respecting the laws and customs of war on land, adopted in 1907.<sup>223</sup>

#### CONVENTION RELATIVE TO THE STATUS OF ENEMY MERCHANT SHIPS AT THE OUTBREAK OF HOSTILITIES (1907)

99. The Convention (VI) relative to the status of enemy merchant ships at the outbreak of hostilities,<sup>224</sup> of 18 October 1907, done also at the Second Peace Conference, provides, in its article 1, that when a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port—or enters a port belonging to the enemy while still ignorant that hostilities have broken out—it is desirable that it should be allowed to depart freely, either immediately or after "a reasonable number of days of grace". Article 2 of the Convention adds that

A merchant ship unable, owing to circumstances of *force majeure*, to leave the enemy port within the period contemplated in the above article, or which was not allowed to leave, cannot be confiscated. The belligerent may only detain it, without payment of compensation, but subject to the obligation of restoring it after the war, or requisition it on payment of compensation.<sup>225</sup>

<sup>222</sup> See para. 560 below.

<sup>223</sup> League of Nations, *Official Journal*, 6th year, No. 9 (September, 1925), p. 1213.

<sup>224</sup> Scott, *op. cit.*, vol. I, p. 637.

<sup>225</sup> *Ibid.* The expression "*force majeure*" was also used in pro-

100. In the commentary to article 2 contained in the general report of the Fourth Commission of the Conference,<sup>226</sup> it is explained that the article contemplates the case of an enemy merchant ship that has been unable to depart, either because it has not been allowed to leave, or because it has been prevented by *force majeure* from taking advantage of its permission to leave. According to the commentary, article 2 intends to give a belligerent State the right to detain the ship on condition of restitution after the war or to requisition it on condition of payment of an indemnity; but, on the other hand, the belligerent State is forbidden to confiscate the ship. It was considered at variance with equity and the security necessary in international trade that a belligerent State should, in addition to the option given it to refuse to allow a ship to depart, claim the right to make innocent commerce bear the burden of a loss "which could not be foreseen".

#### CONVENTION CONCERNING THE RIGHTS AND DUTIES OF NEUTRAL POWERS IN NAVAL WAR (1907)

101. According to the Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War,<sup>227</sup> of 18 October 1907 adopted at the Second Peace Conference, a neutral Government is bound "to employ the means at its disposal" to fulfil the obligations of surveillance provided for in articles 8 and 25 of the Convention.<sup>228</sup> The report of the Third Commission of the Conference explains, in connexion with article 8, that the provision adopted reproduces the [first] rule of Washington,<sup>229</sup> with two slight alterations. The expression "due diligence", which has become

posals relating to the subject matter of this provision submitted by various delegations, among them the delegations of *Russia*, *Sweden* and *Great Britain* (*ibid.*, vol. III, pp. 1130, 1132 and 1135).

<sup>226</sup> J. B. Scott, *The Reports to the Hague Conferences of 1899 and 1907* (Oxford, Clarendon Press, 1917), p. 585. For some examples of the interpretation given by prize courts to the expression "*force majeure*" in article 2 of the Sixth Hague Convention, see J. W. Garner, *Prize Law during the World War* (New York, MacMillan, 1927), pp. 293–294.

<sup>227</sup> *Actes et documents de la Deuxième Conférence ... (op. cit.)*, vol. I, p. 681.

<sup>228</sup> Article 8 of the Convention reads as follows:

"A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming within its jurisdiction of any vessel which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which had been adapted entirely or partly within the said jurisdiction for use in war." (Scott, *The Proceedings of the Hague Peace Conferences: The Conference of 1907*, vol. I, *op. cit.*, p. 833);

and article 25 reads:

"A neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above articles occurring in its ports or roadsteads or in its waters." (*Ibid.*, p. 836.)

<sup>229</sup> Article 6 of the Treaty of Washington of 8 May 1971, concluded between Great Britain and the United States of America reads as follows:



celebrated by its obscurity since its solemn interpretation, has been omitted; we have contented ourselves with saying, in the first place, that the neutral is bound "to employ the means at its disposal" ... and, in the second, "to display the same vigilance ...".<sup>230</sup>

A passage of the report relating to article 25 states that the principle of the third rule of Washington<sup>231</sup> met with no opposition: "it was merely sought to find a formula that does not impose upon neutrals too heavy a responsibility in proportion to the means they have at their disposal. This is more necessary as we are dealing not only with ports, but also with waters ...".<sup>232</sup>

102. Whatever the difference between "due diligence" and "to employ the means at its disposal" may be, it would seem clear that the latter expression implies, *inter alia*, that if a neutral Power is deprived by *force majeure* of means to fulfil the obligations set forth in articles 8 and 25 of the Convention, it would not commit, to that extent, any breach of the obligations concerned and, therefore, would not incur international responsibility on that account.

103. It should also be noted that the expression *force majeure* was used in some articles of the proposal submitted by the *Spanish* delegation regarding rights and duties of neutral Powers in naval war. The articles in question dealt with the question of the limitation of the period of stay of belligerent ships of war in neutral ports and waters and the exceptions thereto which should be recognized in cases such as stress of weather or other *force majeure*.<sup>233</sup> Likewise, *force majeure* was considered in connexion with the question of the destruction of neutral merchant ships captured as prizes. The *Russian* programme of 3 April 1906 raised the question: "Is the destruction of all neutral prizes by reason of *force majeure* illicit

according to laws at present in force and the practice of naval warfare?"<sup>234</sup>

### (k) Peaceful settlement of disputes

#### CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES (1907)

104. In connexion with the revision of the 1899 *Convention for the Pacific Settlement of International Disputes*<sup>235</sup> undertaken by the Hague Second Peace Conference of 1907, some delegations submitted proposals referring to *force majeure*. Thus, for instance, the *Russian* delegation in its proposal on arbitration procedure suggested that

after the meeting of the tribunal, the latter shall immediately proceed [with] the discussions, during which the presentation of new documents or written instruments on the part of the parties to the dispute shall not be permitted except in the case of actual *force majeure* and of absolutely unforeseen circumstances.<sup>236</sup>

The *German* delegation proposed that the arbitration tribunal, after the closing of the pleadings, shall "take into consideration all new papers or documents which both parties shall agree to produce, or the production of which could not be made sooner by reason of *force majeure* or unforeseen circumstances".<sup>237</sup> Those proposals were not incorporated in the 1907 *Convention for the Peaceful Settlement of International Disputes*,<sup>238</sup> articles 67 and 68 of which reproduce the corresponding provision of the 1899 Convention (articles 42 and 43).

105. References to *force majeure* were also made in the First Sub-Commission and Committee A of the First Commission of the 1907 Conference during the consideration of questions relating to the revision of the system of arbitration of the 1899 Convention. Thus, for instance, the representative of *Haiti* pointed out that,

it is certain that the circumstances of *force majeure* that should put a State into a condition, only momentarily, of being unable to pay a debt, would come within the jurisdiction of the arbitration court. For the circumstances of *force majeure*, that is to say, of the facts independent of the will of man, may, in paralysing the will to do, frequently prevent the execution of obligations.

... I cannot imagine a great creditor nation which, in virtue of the arbitral decision, would forget to consider as "of bad faith" the debtor State unable to meet its obligations as the result, say, of an inundation, of a volcanic eruption, of failure of crops, etc. The testimony of contemporaneous history is against any such admission...<sup>239</sup>

and the representative of *Romania* said that it is the first duty of a State to administer its finances and its economic relations in such a manner that it may in all circum-

<sup>234</sup> *Ibid.*, pp. 1086-1116.

<sup>235</sup> J. B. Scott, *The Proceedings of the Hague Peace Conferences: The Conference of 1899* (New York, Oxford University Press, 1920), pp. 235-246.

<sup>236</sup> *Ibid.*, *The Conference of 1907*, vol. II (New York, Oxford University Press, 1921), pp. 869-870.

<sup>237</sup> *Ibid.*, pp. 870-871.

<sup>238</sup> J. B. Scott, *The Conventions and Declarations of the Hague of 1899 and 1907* (New York, Oxford University Press, 1920), p. 41.

<sup>239</sup> Scott, *The Conference of 1907*, vol. II (*op. cit.*), pp. 294-295.

(Foot-note 229 continued.)

"In deciding the matters submitted to the arbitrators, they shall be governed by the following rules, which are agreed upon by the High Contracting Parties as rules to be taken as applicable to the case, and by such principles of international law not inconsistent therewith as the arbitrators shall determine to have been applicable to the case.

#### "Rules

"A neutral Government is bound:

"First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use;

"Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men;

"Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties." (*Ibid.*, vol. III, p. 605.)

For the award rendered by the Geneva Tribunal in the *Alabama* case, see paras. 334-335 below.

<sup>230</sup> *Ibid.*, p. 496.

<sup>231</sup> See foot-note 229 above.

<sup>232</sup> *Ibid.*, p. 516.

<sup>233</sup> *Ibid.*, pp. 703-704.



stances meet its obligations. It has been said that there are cases of *force majeure*, of great economic crisis that might, at a given moment, shake the solvency of the State ... such eventualities are too rare to make it necessary to foresee their consequences in international stipulations.<sup>240</sup>

### (I) Conventional liability régimes for injurious consequences arising out of acts relating to certain activities

106. States have established by treaty a series of régimes governing liability for injurious consequences arising out of acts relating to certain activities not necessarily prohibited by international law. Some of those régimes follow the "fault" liability principle, but in other instances developments in science and technology have prompted States to base them on other legal concepts, such as the concept of "strict" or "absolute" liability.<sup>241</sup> The degree of risk for third parties involved in certain hazardous or ultra-hazardous activities and the extension of the damage eventually resulting therefrom explain the acceptance in international conventional law of the legal concepts of "strict" or "absolute" liability.<sup>242</sup>

<sup>240</sup> *Ibid.*, p. 299. *Force majeure* was also mentioned in connexion with the situation created by the opposition of Parliament to the vote of a draft law. Some delegations expressly rejected the view that a Government might allege refusal on the part of its Parliament as a case of *force majeure* (*ibid.*, pp. 443, 450, 451 and 455). The Convention (XII) relative to the Creation of an International Prize Court, of 18 October 1907, considered also in the First Commission of the Second Peace Conference, refers twice to *force majeure*. Article 21 states that the seat of the Court is at The Hague and it cannot, except in case of *force majeure*, be transferred elsewhere without the consent of the belligerents; and article 31, after stating that if the appellant does not enter his appeal within the period laid down in articles 28 or 30 it shall be rejected without discussion, says the following: "Provided that he can show that he was prevented from so doing by *force majeure*, and that the appeal was entered within sixty days after the circumstances which prevented his entering it before had ceased to operate, the Court can, after hearing the respondent, grant relief from the effect of the above provision." (*Ibid.*, vol. I, pp. 664-666.)

This Convention never entered into force. Proposals made on the matter by the delegations of *France, Germany, Great Britain and the United States of America* mentioned also *force majeure* (Scott, *Reports to The Hague Conferences of 1899 and 1907* (*op. cit.*), pp. 797 and 805).

<sup>241</sup> Generally speaking "fault liability" connotes the attachment of liability to an actor who causes the harm intentionally or negligently. "Strict" or "absolute" liability may be said to exist when compensation is due for damage caused to others independently of any fault or negligence on the part of the actor. Sometimes, the expression "absolute liability" is used to indicate a more rigorous form of liability than that usually termed "strict".

<sup>242</sup> The question of regulating internationally liability for certain hazardous or ultra-hazardous activities has also been the object of particular attention by authors during the last 20 years. Most of their writings analyse in detail existing conventional law on the matter. See, for instance: G. Arangio-Ruiz, "Some international legal problems of the civil uses of nuclear energy", *Recueil des cours...*, 1962-III, (Leyden, Sijthoff, 1963), vol. 107, p. 497; C. A. Colliard, "La Convention de Bruxelles relative à la responsabilité des exploitants de navires nucléaires", *Annuaire français de droit international*, 1962 (Paris), vol. VIII (1963) p. 41; J. Constantinoff, "La revision de la Convention de Varsovie et la responsabilité du transporteur aérien", *Revue française de droit aérien*, (Paris), vol. 24, No. 4 (Oct.-Dec. 1970), p. 393; F. Durante, *Responsabilità internazionale e attività cosmiche* (Padua, CEDAM,

107. A reference to those régimes is not without interest for the purpose of the present paper. As the examples recorded below show, *force majeure* and "fortuitous event" are not altogether absent therefrom, even when "strict" or "absolute" liability is the basic principle underlying the régime concerned. The possibility of invoking, as an exception to liability under those kinds of régimes, situations of *force majeure* or "fortuitous event" is certainly much more limited than that of invoking those exceptions as normally understood in international law. But notwithstanding such limitations, most of the conventional régimes in question recognize, in one way or another, certain specified circumstances as an exception to liability, falling normally under the concept of *force majeure* or "fortuitous event".

### MARITIME NAVIGATION

108. The conventional régimes governing liability in matters relating to maritime navigation are very much inspired by the "fault" liability principle. *Force majeure* and "fortuitous event" as exceptions to liability therefore have a very large role to play within those régimes. Thus, the *International Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels*,<sup>243</sup> signed at Brussels on 23 September 1910, expressly states that "if the collision is accidental, if it is caused by *force majeure*, or if the cause of the collision is left in doubt, the damages are borne by those who have suffered them" (art. 2). If the collision is caused by the fault of one of the vessels, liability to make good the damage attaches to the one which has committed the fault (art. 3) and if two or more vessels are in fault the liability of each vessels is in proportion to the degree of the faults respectively committed (art. 4). Moreover, "fault" must be proved by the claim-

1969); W. F. Foster, "The Convention on international liability for damage caused by space objects", *The Canadian Yearbook of International Law*, 1972 (Vancouver, B.C., 1973) vol. X, p. 137; D. Goedhuis, "Conflicts of law and divergencies in the legal régimes of air space and outer space", *Recueil des cours...*, 1963-II (Leyden, Sijthoff, 1964), vol. 109, p. 257; L. F. E. Goldie, "Liability for damage and the progressive development of international law", *International and Comparative Law Quarterly* (London), vol. 14 (October 1965) p. 1189; C. W. Jenks, "Liability for ultra-hazardous activities in international law", *Recueil des cours...*, 1966-I (Leyden, Sijthoff, 1967), vol. 117, p. 99; M. Lachs, "The international law of outer space", *Recueil des cours...*, 1964-III (Leyden, Sijthoff, 1966), vol. 113, p. 7; R. Y. Jennings, "General course of principles of international law", *Recueil des cours...*, 1967-II (Leyden, Sijthoff, 1969), vol. 121, pp. 511-526; G. P. Zhukov, "Fundamental principles of space law", *Contemporary International Law: Collection of articles edited by Prof. G. Tunkin* (Moscow, Progress, 1972), p. 283; J. M. Kelson, "State responsibility and the abnormally dangerous activity", *Harvard International Law Journal* (Cambridge, Mass.), vol. 13, No. 2 (spring, 1972), p. 197; P. Strohl, "La Convention de 1971 relative à la responsabilité civile dans le domaine du transport maritime de matières nucléaires: un essai de conciliation entre le droit maritime et le droit nucléaire", *Annuaire français de droit international*, 1972 (Paris), vol. XVIII (1973) p. 753.

<sup>243</sup> *Register of Texts of Conventions and Other Instruments concerning International Trade Law*, vol. II (United Nations publication, Sales No. E.73.V.3), p. 126.

ant, article 6 of the Convention providing that "all legal presumptions of fault in regard to liability for collision are abolished".

109. *The International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Seagoing Vessels*,<sup>244</sup> signed at Brussels on 25 August 1924, lays down in article 2 that the limitation of liability set forth in article 1 of the Convention does not apply, *inter alia*, "to obligations arising out of acts or faults of the owner of the vessel". A similar approach is followed by the *International Convention relating to the Limitation of the Liability of Owners of Seagoing Ships*,<sup>245</sup> signed at Brussels on 10 October 1957.

110. *The International Convention for the Unification of Certain Rules relating to the Carriage of Passengers by Sea*,<sup>246</sup> done at Brussels, on 26 April 1961, makes liability of the carrier for damage dependent upon proof by the claimant that the damage in question was due to the fault or neglect of the carrier. Subject to the contrary being proved, such fault or neglect is presumed only in case of death or personal injury arising from or in connexion with shipwreck, collision, stranding, explosion or fire (art. 4). A similar system is provided for in the *International Convention for the Unification of Certain Rules relating to Carriage of Passenger Luggage by Sea*<sup>247</sup> done at Brussels on 27 May 1967, and the *Athens Convention relating to the Carriage of Passengers and their Luggage by Sea*,<sup>248</sup> of 30 December 1974.

#### AERIAL NAVIGATION

111. In the field of civil aviation, the *Convention for the Unification of Certain Rules relating to International Carriage by Air*,<sup>249</sup> done at Warsaw 12 October 1929, presumes the liability of the carrier but the presumption is rebuttable by proof that all necessary measures were taken by him to avoid damage or that it was impossible for him to take such measures. According to article 17 of the Convention, the carrier is liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking, and article 18 states, *inter alia*, that the carrier is liable for

<sup>244</sup> *Ibid.*, p. 143.

<sup>245</sup> *Ibid.*, p. 170. Article 1 of this Convention provides that liability may be limited "unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owners".

<sup>246</sup> Nagendra Singh (*op. cit.*), p. 1358. Contributory fault of the passenger may exonerate the carrier wholly or partly from liability (art. 5).

<sup>247</sup> *Diplomatic Conference on Maritime Law, Twelfth Session, First Phase (Brussels, 1967)* (Brussels, Goemaere, 1967), p. 389.

<sup>248</sup> Inter-Governmental Maritime Consultative Organization, *International Legal Conference on the Carriage of Passengers and Their Luggage on Board Ships, 1974, Final Act of the Conference* (IMCO publication, Sales No. 75.03.E), p. 21.

<sup>249</sup> League of Nations, *Treaty Series*, vol. CXXXVII, p. 11.

damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air. These provisions are, however, supplemented by the rules set forth in article 20, which reads as follows:

1. The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

2. In the carriage of goods and luggage, the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects he and his agents have taken all necessary measures to avoid the damage. The carrier may also be wholly or partly exonerated in respect of liability in the case of the contributory negligence of the injured person (art. 21).

112. Article 1 of the *Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface*,<sup>250</sup> done at Rome on 7 October 1952,<sup>251</sup> contemplates the liability of the operator of the aircraft for compensation upon proof only that damage was caused. The damage in question must be "the direct consequence of the incident giving rise thereto". Liability is not made dependent by the Convention on fault by the operator. The absolute liability thus imposed on the air carrier is nevertheless qualified by certain specified exceptions or exonerations. Particularly relevant in this respect is the rule set forth in article 5, which provides that any person who would otherwise be liable under the provisions of the Convention shall not be liable "if the damage is the direct consequence of armed conflict or civil disturbance, or if such person has been deprived of the use of the aircraft by act of public authority". Contributory fault or negligence of the claimant may be also cause of exoneration from or reduction of liability (art. 6). Moreover, the "intent to cause damage" on the part of the operator is taken into account by the Convention in connexion with the determination of the "extent of liability" (art. 12). In addition, *force majeure* is expressly referred to in article 16, which enumerates the defences available to the insurer or any other person providing security required under the Convention for the liability of the operator against claims.

#### POLLUTION

113. With regard to the protection of the maritime environment against oil pollution, article III of the *International Convention on Civil Liability for Oil Pollution Damage*,<sup>252</sup> done at Brussels, on 29 November 1969, stipulates, *inter alia*, the following:

<sup>250</sup> United Nations, *Treaty Series*, vol. 310, p. 181.

<sup>251</sup> This Convention supersedes, between the Contracting Parties, the International Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft, done at Rome on 29 May 1933 (League of Nations, *Treaty Series*, vol. CXCII, p. 289).

<sup>252</sup> United Nations, *Juridical Yearbook, 1969* (United Nations publication, Sales No. E.71.V.4), p. 174.

1. Except as provided in paragraphs 2 and 3 of this article, the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident;

2. No liability for pollution damage shall attach to the owner if he proves that the damage:

(a) Resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or

(b) Was wholly caused by an act or omission done with intent to cause damage by a third party, or

(c) Was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

The absolute liability principle provided for in paragraph 1 of the article quoted above is qualified by the exceptions of paragraphs 2 and 3.<sup>253</sup> The exception to liability provided for in paragraph 2 (a) deals with situations relating to *force majeure* (subparagraphs (b) and (c) relate rather to the exception of "*cause étrangère*"). It should be added that the "actual fault or privity of the owner" is taken into account by the Convention in connexion with the limitation of the "extent" of liability (art. V) and "wilful misconduct of the owner" is listed among the defences available to the insurer (art. VII).<sup>254</sup>

114. On 18 December 1971, the States Parties to the 1969 International Convention on Civil Liability for Oil Pollution Damage concluded, at Brussels, the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*.<sup>255</sup> The established Fund is supposed to pay compensation to any person suffering pollution damage if such person has been unable to obtain full and adequate compensation for the damage under the 1969 Liability Convention. Paragraph 2 (a) of article 4 of the Convention provides, however, that the Fund shall incur no obligation if it proves, *inter alia*, that the pollution damage resulted from "an act of war, hostilities, civil war or insurrection".

<sup>253</sup> Para. 3 concerns the case of contributory fault or negligence of the injured person.

<sup>254</sup> The Tanker Owners' Voluntary Agreement concerning Liability for Oil Pollution (American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. VIII, No. 3, May 1969, p. 498), concluded in London on 7 January 1969 provides in its article IV, entitled "Liability and responsibility to Governments", that (a) if a discharge of oil occurs from a participating tanker through the negligence of that tanker (and regardless of the degree of its fault), and if the oil causes damage by pollution to coast lines within the jurisdiction of a Government, or creates a grave and imminent danger of damage by pollution thereto, then the participating owner of that tanker shall remove the oil so discharged, or pay the costs reasonably incurred by the Government concerned to remove the said oil, subject to the maximum liability set forth in article VI; (b) the participating owner shall be liable under paragraph (a) hereof unless he can prove that the discharge of oil from his participating tanker occurred without fault on the part of the said tanker.

<sup>255</sup> Inter-Governmental Maritime Consultative Organization, *Conference on the Establishment of an International Compensation Fund for Oil Pollution Damage, 1971; Final Act of the Conference* (IMCO publication, Sales No. 1972.10), p. 47.

## NUCLEAR ENERGY

115. That the operator should be strictly liable for damage resulting from nuclear activities is also the guiding principle of the conventional liability régimes established in that field. According to article 3 of the *Convention on Third Party Liability in the Field of Nuclear Energy*,<sup>256</sup> done at Paris on 29 July 1960,<sup>257</sup> proof that damage has been caused by nuclear fuel, radioactive products or waste at nuclear installations suffices to impose liability on the operator. Among the exceptions qualifying the strict liability of the operator, article 9 of the Convention mentions damage caused by a nuclear incident due to "an act of armed conflict, invasion, civil war, insurrection, or grave natural disaster of an exceptional character".<sup>258</sup> Acts of war, hostilities, civil war or insurrection similarly qualify the principle of the absolute liability of the operator embodied in the *Convention on the Liability of Operators of Nuclear Ships*,<sup>259</sup> done at Brussels, on 25 May 1962. A similar provision is contained in the *Vienna Convention on Civil Liability for Nuclear Damage*<sup>260</sup> of 21 May 1963, which is likewise based on the principle of absolute liability (art. IV, para. 1). The latter Convention also provides that, except in so far as the law of the State where the installation is located may provide to the contrary, the operator shall not be liable for nuclear damage caused by a nuclear incident directly due to "a grave natural disaster of an exceptional character" (art. IV, para. 3 (b)).

## OUTER SPACE

116. So far as outer space is concerned, the *Convention on International Liability for Damage caused by Space Objects*,<sup>261</sup> of 29 November 1971, establishes a dual system of liability. First, article II provides that a launching State is absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight. Secondly, article III provides that

<sup>256</sup> Council of Europe, *European Yearbook, 1960* (The Hague, 1961), vol. VIII, p. 203.

<sup>257</sup> Convention concluded under the auspices of the Organisation for European Economic Co-operation (OEEC), now the Organisation for Economic Co-operation and Development (OECD). The Convention has been supplemented by the Convention of 31 January 1963 (*idem, European Yearbook, 1963* (The Hague, 1965), vol. XI, p. 283).

<sup>258</sup> Paragraph 48 of an "Explanatory Memorandum" annexed to the Convention underlines the difference in scope between such an exception and *force majeure* or "fortuitous event" by pointing out that the absolute liability of the operator is not subject to the "classic exonerations" for fortuitous acts, *force majeure*, acts of God or intervening acts of third persons, whether or not such acts were reasonably foreseeable and avoidable.

<sup>259</sup> *Diplomatic Conference on Maritime Law, Eleventh Session, Second Phase* (Brussels, 1962) (Brussels, Goemaere, 1963), p. 720.

<sup>260</sup> United Nations, *Juridical Yearbook, 1963* (United Nations publication, Sales No. 65.V.3), p. 148. This Convention was concluded under the auspices of the International Atomic Energy Agency (IAEA).

<sup>261</sup> General Assembly resolution 2777 (XXVI), annex.

where damage is caused elsewhere than on the surface of the earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, the latter shall be liable only if the damage is due to its fault or the fault of persons for whom it is responsible.<sup>262</sup>

The incorporation in article II of the Convention of the concept of absolute liability marks the first time that an international agreement has sought to impose such a liability régime on States in their capacity as States. The conventions referred to in the preceding paragraphs have restricted the imposition of strict or absolute liability to operators and enterprises and have only incidentally imposed such liability on States in their capacity as operators.

117. Article VI of the Convention provides that exoneration from absolute liability shall be granted to the extent

<sup>262</sup> Fault is also taken into account for determining the apportionment of the burden of compensation in cases of joint and several liability (art. IV).

that a launching State establishes that the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of a claimant State or of natural or juridical persons it represents.

No exoneration from liability is provided by the Convention where a "natural disaster" is the cause of the space object accident. It was generally felt that to exonerate a launching State from liability in such circumstance would largely nullify, for the purpose of the Convention, the effect of the principle of absolute liability.<sup>263</sup>

<sup>263</sup> The question of exoneration on the ground of *force majeure* received some attention in the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space in connexion with a proposal made by Hungary in 1965 (A/AC.105/C.2/L.10/Rev.1), which included "natural disaster" among the grounds for exoneration. Some representatives made statements in favour of the proposal, while others considered that to allow exoneration on the ground of natural disaster or *force majeure* would be to deviate from the main objective of the Convention (see A/AC.105/C.2/SR.50 (1965) and A/AC.105/C.2/SR.77 and 78 (1967)).

## SECTION 2. STATE PRACTICE AS REFLECTED IN DIPLOMATIC CORRESPONDENCE AND OTHER OFFICIAL PAPERS DEALING WITH SPECIFIC CASES

118. The present section is devoted to State practice as reflected in diplomatic correspondence and other official papers dealing with specific cases. Some of the materials referred to mention expressly *force majeure*, "fortuitous event" or "impossibility". Others refer to "fault", "wilfulness", "negligence", "due diligence", etc., or to the absence of such elements. Both kinds of materials relate to situations of *force majeure* or to "fortuitous events" or to situations which could approximate to circumstances of that kind.

119. As will appear from the materials, State practice underlines the specific conditions surrounding the act or omission concerned. The lawfulness or unlawfulness of the conduct in question is analysed by reference to both the content of the related "primary" rule and the specific factual elements of the case. For example, when an aircraft belonging to a State flies over the territory of another State without the consent of the latter, the specific conditions in which the flight took place are referred to for determining whether a breach of the obligation to respect the sovereignty and territorial integrity of States has been committed or whether a justification of *force majeure* exists precluding such a qualification. Sometimes, however, the expression *force majeure* has also been used by States to qualify a general situation in the context of which the conduct concerned has been adopted by the subject of the obligation. Thus, for instance, civil wars, revolutions and insurrections were sometimes called situations of *force majeure* in relation to the fulfilment of certain obligations concerning the treatment of aliens without further reference being made to the specific conditions surrounding the act or omission in question. Bearing this in mind, the materials are presented

under broad headings evoking either the types of conduct involved (land frontier incidents; maritime incidents; aerial incidents; pollution; protection of offshore fisheries; reimbursement of debts; international terrorism and aircraft hijacking) or the context in which the conduct concerned was adopted (civil wars, revolutions, insurrections, riots and mob violence; international armed conflicts or hostilities). Under those broad headings, the materials are organized chronologically.

120. This section does not include materials relating to constitutional provisions or national legislation. It may happen, however, that the enactment of national legislation prompts Governments to exchange diplomatic correspondence. Thus, for example, Italy sent a note to Venezuela in connexion with the Venezuelan Law of Aliens of 1903, article 17 of which provided that "the State is not answerable for damage or injuries caused by agents or armed groups in the service of a revolution".<sup>264</sup> In his reply

<sup>264</sup> M. T. Pulido Santana, *La Diplomacia en Venezuela*, vol. 1 (Caracas, Imprenta Universitaria, 1963) (thesis), pp. 128 and 131. For the Venezuelan Law of Aliens of 1923 see *ibid.*, pp. 144-146. Domestic legislation based upon somewhat similar principles has also been enacted in other Latin American countries. For instance, article 3 of a Colombian Law of 31 August 1886 provided that "the nation is not necessarily responsible for losses sustained by foreigners at the hands of the rebels" (for the Law and its implementation decree of 11 October 1866, see *British and Foreign State Papers, 1885-1886* (London, Ridgway, 1893), vol. 77, pp. 808, 810-811; article 1 of an Ecuadorian Law of 17 July 1888 provided that "the nation is not responsible for the losses and damages caused by the enemy during international or civil war or by tumults or mutinies nor for those which may be caused in similar cases on the part of the government by means of military operations and the inevitable consequences of the war. Natives and foreigners will not have the right of being indemnified in these cases" (quoted by H. Arias, *loc. cit.*, p. 758). The constitutions of

dated 21 November 1903, the Venezuelan Foreign Minister defended his Government's attitude of admitting no responsibility except for damage done by the legitimate authorities stating that "... the Government fulfilled its duty by combating and putting down the insurrection, and the action it took was the inevitable consequence of disasters which, like those of natural origin, cannot be prevented or avoided..."<sup>265</sup>

(a) Land frontier incidents

CROSSING OF THE AUSTRIAN BORDER  
BY ITALIAN OFFICIALS (1862)

121. In a note dated 2 August 1862, the Prussian Minister at Turin, who was responsible for looking after Austrian interests in Italy, conveyed a protest from the Austro-Hungarian Government concerning an alleged territorial violation by Italian soldiers on the Austrian island of Tessano in the River Po. In his reply, dated 25 August 1862, the Italian Foreign Minister stated that a "humanitarian act" could not be viewed as a "territorial violation" and contended that:

In fact it was not Italian soldiers but two Customs officials, who, hearing cries of distress coming from the uninhabited island of Mezzano Boscajoli situated opposite the Guarda Ferrarese post, landed on the island *without any hostile intent* and, finding a half-drowned soldier, transported him to our bank of the river...<sup>266</sup>

CROSSING OF THE MEXICAN BORDER BY A  
UNITED STATES DETACHMENT (1886)

122. Captain E. Crawford of the United States Army was shot and killed in Mexico on 11 January 1886 by Mexican troops while he was in command of a detachment of Indian scouts which had crossed the border. The Mexican Government argued that the early morning shooting occurred due to the Indian scouts having been mistaken for hostile Indians. Having reached the conclusion, after examining all the evidence, that the shooting was not an intentional act, the United States of America did not press the claim.<sup>267</sup>

some Latin American countries contained provisions dealing with the matter, such as, for example, the Constitution of El Salvador of 1883, article 46 of which read as follows: "... neither Salvadorians nor foreigners shall in any case claim from the government any indemnity for damages or losses they may suffer in their persons or property caused by political disturbances; their right to claim redress from culpable functionaries or private individuals remains intact" (*ibid.*, p. 757). Other examples of provisions in Latin American Constitutions may be found in A. Sánchez de Bustamante y Sirvén, *Droit international public* (Paris, Sirey, 1936), vol. III, pp. 559-560.

<sup>265</sup> Pulido Santana, *op. cit.*, p. 131.

<sup>266</sup> Società Italiana per l'Organizzazione Internazionale - Consiglio Nazionale delle Ricerche. *La prassi italiana di diritto internazionale* (Dobbs Ferry, N.Y., Oceana, 1970), vol. II, p. 869.

<sup>267</sup> J. B. Moore, *A Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1906), vol. VI, p. 759.

INCIDENT ON THE FRONTIER BETWEEN BULGARIA AND  
GREECE (1925)

123. The Convention between Greece and Bulgaria, signed on 27 November 1919, recognized the right of their respective nationals who belonged to racial, religious or linguistic minorities to emigrate freely to their respective territories. Emigrants would lose the nationality of the country they left and acquire that of the country of destination. Their real property had to be liquidated in the country which they left, and the time-limit for making declarations claiming this right of voluntary emigration expired at the end of 1924. The fixing of the values of the property belonging to emigrants, which was to be decided by a mixed commission, progressed very slowly and a feeling of discontent arose among the emigrants.

124. Meanwhile, there were also in Bulgaria a considerable number of refugees of Bulgarian background who had come from Greece at different periods and who had been unwilling to avail themselves of the Convention on voluntary emigration of 1919. Instead, they claimed the rights conferred by the Treaty of Sèvres concerning the treatment of minorities, which had provided for the right of Bulgarian or Turkish nationals habitually resident in territories transferred to Greece by treaties subsequent to 1 January 1913 to opt for nationalities other than that of Greece. Those who had opted for other nationalities had to leave Greece within 12 months, but they were entitled to retain their immovable property in Greek territory. These provisions entitled natives of districts newly incorporated in Greece to return there even if they had left those districts many years previously, and in any case to retain their real property in those districts. There were a considerable number of these persons in Bulgaria, most of whom had left property in Greece for which they had received no compensation.<sup>268</sup>

125. A League of Nations commission was instructed to make an inquiry into the incidents which had occurred on the frontier between the two States and in 1925 it made the following recommendations as to the situation outlined above:

... under the pressure of circumstances, the Greek Government employed this land [the ex-Bulgarian district] to settle refugees from Turkey. *To oust these refugees now in order to permit the return of the former owners would be impossible.*\* Nor would such a proceeding be desirable, for its consequences would be to re-create in Greece minorities which events had caused to disappear.<sup>269</sup> The Commission added, however, that if those Bulgarians were to be asked to give up a right, it was only just that they should be compensated for the value of the property they had left behind them.<sup>270</sup>

<sup>268</sup> Report of the Commission of Enquiry into the Incidents on the Frontier between Bulgaria and Greece (League of Nations, *Official Journal*, 7th year, No. 2 (February 1926) annex 815, pp. 208 and 209).

<sup>269</sup> *Ibid.*, p. 209.

<sup>270</sup> *Ibid.*

126. Commenting on the above recommendations of the Commission, the Bulgarian representative, Mr. Kalfoff, made the following statement at the first meeting of the thirty-seventh session of the Council of the League of Nations on 7 December 1925:

*The Commission ... expresses the opinion that the arrival in Greece of a great number of refugees from Asia Minor renders the application of articles 3 and 4 of the Treaty of Sèvres impossible, and proposes their abrogation in return for an indemnity to be paid to the owners of property abandoned and used for the installation of the Greek refugees\* ... I must state ... that the owners of this property have during a period of four years had the option of requesting its liquidation through the Greco-Bulgarian Commission, but that they have refused to avail themselves of this right. The Bulgarian Government has not at its disposal any means of compelling these people to act against their convictions.\* Nothing hinders the Greek Government from according to this class of persons a further period of delay in which to ask for the liquidation of their property if it believes that they have changed their views since December 31st last.<sup>271</sup>*

#### CROSSING OF THE BASUTOLAND BORDER BY SOUTH AFRICAN POLICE (1961)

127. On 26 August 1961 South African police arrested a Mr. Anderson Ganyile on Basutoland territory. On 29 January 1962, in reply to a question about the measures which the British Government had taken, the Minister of State for Foreign Affairs stated in the House of Commons:

*The South African Government have now given us a full account of the circumstances of Mr. Ganyile's arrest by South African police on Basutoland territory. They have informed us that the South African police crossed into Basutoland by mistake while searching for suspected murderers in the South African native trust territory adjoining Basutoland and arrested Mr. Ganyile and his companions under the mistaken impression that they were the individuals for whom they were searching.\* The South African Government have expressed their regrets at this violation of British territory and they have also released Mr. Ganyile and his companions without pursuing the charges against them. We have left the South African Government in no doubt of the serious view which we take of this violation of Basutoland territory.<sup>272</sup>*

#### SHELLING OF LIECHTENSTEIN TERRITORY BY A SWISS MILITARY UNIT (1968)

128. On 14 October 1968, five shells exploded near the valley of Malbuntal, Liechtenstein, a tourist area close to the border with Switzerland. It was soon discovered that the firing error had been committed by a Swiss artillery unit. On 15 October, the Liechtenstein Government protested to the Swiss Government against the "violation of its territorial sover-

<sup>271</sup> *Ibid.*, p. 111.

<sup>272</sup> United Kingdom, *Parliamentary Debates (Hansard), House of Commons, Official Report* (London, H.M. Stationery Office), 5th series, vol. 652, 29 January 1962, col. 702. In reply to questions as to a possible claim for compensation by Mr. Ganyile against the South African Government, the Minister said: "... Mr. Ganyile proposes to seek compensation. He is a South African national and it is for him to pursue the matter ... It is for Mr. Ganyile to put the claim forward. I do not think that support from Her Majesty's Government arises at this time ..." (*ibid.*, col. 704).

eighty".<sup>273</sup> On the same day, the Swiss Government expressed regrets to the Liechtenstein Legation about "this involuntary violation of the Liechtenstein territory" and gave assurances that it would pay reparations for the damages and take the necessary measures to prevent a repetition of the accident in the future.<sup>274</sup>

#### (b) Maritime incidents

##### THE DOGGER BANK INCIDENT BETWEEN GREAT BRITAIN AND RUSSIA (1904)

129. On 25 February (12 February) 1905, the International Commission of Inquiry established by the British and Russian Governments, under The Hague Convention for the Pacific Settlement of International Disputes of 1899, submitted a final report on its investigation of the facts surrounding the Dogger Bank incident. According to the report, the second Russian squadron of the Pacific Fleet, under Commander-in-Chief Admiral Rojdestvensky, was on the way to the Far East at the time of the incident. The fleet was extremely cautious of possible torpedo attacks. In the evening of 21 October (8 October) 1904, the fleet had been proceeding near the Dogger Bank in the North Sea, when the last vessel, which had been left behind owing to damage to its engines, telegraphed the Commander-in-Chief that it was "attacked on all sides by torpedo boats". This led Admiral Rojdestvensky to signal to his ships to redouble their vigilance and look out for an attack by torpedo boats, giving standing orders that the officer of the watch was authorized to open fire in case of an evident and imminent attack. Towards 1 o'clock on 22 October (9 October), a rather dark night with a low fog clouding the air, the Russian fleet met about 30 small steamboats—trawlers from Hull, England, fishing on the usual fishing ground. The first shot was fired against a "suspicious looking" trawler by the order of the Admiral. The Admiral then made a signal to the squadron "not to fire on the trawlers". Soon after, other shots followed. The firing of shots lasted about 10 to 12 minutes, causing various losses to the trawlers and their crews. The commissioners recognized unanimously that the fishing vessels did not commit any hostile act, and the majority of the commissioners concluded that there were no torpedo boats either among the trawlers nor anywhere near, and therefore the opening of fire by Admiral Rojdestvensky was not justifiable. The Russian commissioner, however, expressed the conviction that "it was precisely the suspicious-looking vessels approaching the squadron with hostile intent which provoked the fire". The commissioners were unanimous, nevertheless, in recognizing "that Admiral Rojdestvensky personally did everything he could.

<sup>273</sup> *Revue générale de droit international public* (Paris), vol. LXXXIII, No. 3 (July-Sept. 1969) p. 871.

<sup>274</sup> *Annuaire suisse de droit international, 1969-1970* (Zurich, 1971), vol. 26, p. 158.

from beginning to end of the incident, to prevent trawlers, recognized as such, from being fired upon by the squadron".<sup>275</sup>

THE "CHATTANOOGA" INCIDENT BETWEEN FRANCE  
AND THE UNITED STATES OF AMERICA (1906)

130. On 28 July 1906, an American citizen, Lieutenant England, while on duty on the U.S.S. *Chattanooga* in the harbour of Chefoo [Yen-t'ai], China, was mortally wounded by a stray rifle bullet from a French warship, which was engaged in rifle practice. The United States Secretary of State, Mr E. Root, wrote to the American Ambassador McCormick in an instruction dated 13 November 1906 as follows:

*While the killing of Lieutenant England can only be viewed as an accident, it cannot be regarded as belonging to the unavoidable class whereby no responsibility is entailed.\** Indeed, it is not conceivable how it could have occurred without the contributory element of lack of proper precaution on the part of those officers of the *Dupetit Thouars* who were in responsible charge of the rifle firing practice and who failed to stop firing when the *Chattanooga*, in the course of her regular passage through the public channel, came into the line of fire.

... This Government has no disposition to put forward a demand of an exemplary character in this case. It is, however, as the guardian and representative of the interests of its citizens, proper that it should take cognizance of the claim of the parent and relatives of Lieutenant England that some *substantial reparation is due to them for the destruction of this young life of promise under circumstances which, it is represented, would have laid good ground for reparation by course of law if the incident had occurred between private parties.*<sup>\*276</sup>

131. On 5 June 1907, France paid 30,000 francs as a "personal indemnity" to the family of the victim.<sup>277</sup>

THE "NAIWA" INCIDENT BETWEEN THE UNITED KINGDOM  
AND THE UNITED STATES OF AMERICA (1920)

132. In August 1920, a vessel (the *Naiwa*) belonging to the United States Shipping Board was stranded on Stranger Cay, North Bahamas. The Customs authorities of the Bahamas demanded the payment of a duty upon the cargo of the *Naiwa*, which was transferred to two American ships, based on the Bahamas' tariff act which provided for a 5 per cent Customs duty on exports of "wrecked goods". In a communication dated 5 November 1921 to the American Consul at Nassau, Lathrop, the Director of the Consular Service of the United States Department of State, Carr, advised the Consul to withhold the payment of the export duty, arguing, *inter alia*:

... Under generally accepted principles, it is usually held that a vessel which is driven into waters by stress of weather or other causes beyond the master's control, does not thereby become subject to the foreign jurisdiction.\*

<sup>275</sup> *American Journal of International Law* (New York), vol. 2, No. 4 (October 1908), pp. 929-936.

<sup>276</sup> M. M. Whiteman, *Damages in International Law* (Washington, D.C., U.S. Government Printing Office, 1937), vol. I, p. 221.

<sup>277</sup> *Ibid.*

The British Acting Colonial Secretary in the Bahamas informed the American Consul on 6 March 1922 that, "in view of all the circumstances of the case", his Government did not desire to press the claim for the payment.<sup>278</sup>

THE "DAIGO FUKURYU MARU" INCIDENT BETWEEN  
JAPAN AND THE UNITED STATES OF AMERICA (1954)

133. On 1 March 1954, the United States of America conducted nuclear tests at the Eniwetok testing grounds in the Marshall Islands after defining the danger zone around the area. Later, the Japanese Government announced that injuries from radioactive fall-out had been sustained on that day by members of the crew of a Japanese fishing vessel, the *Daigo Fukuryu Maru*, which at the time of the tests was outside the danger zone. One of the injured died in September 1954.<sup>279</sup> On 4 January 1955, the Governments of Japan and the United States reached a settlement of Japanese claims through an exchange of notes. The American note read, *inter alia*:

The Government of the United States of America has made clear that it is prepared to make monetary compensation as an additional expression of its concern and regret over the injuries sustained.

I now desire to inform Your Excellency that the Government of the United States of America hereby tenders, *ex gratia*, to the Government of Japan, without reference to the question of legal liability, the sum of two million dollars for purposes of compensation for the injuries or damages sustained as a result of nuclear tests in the Marshall Islands in 1954.<sup>280</sup>

THE "MILWOOD" INCIDENT BETWEEN ICELAND  
AND THE UNITED KINGDOM (1963)

134. In 1963, a British trawler, the *Milwood*, was charged by Iceland with fishing illegally within its fishery limits and was arrested by the Icelandic coast-guard vessel *Odinn*. However, it was found that the skipper, Smith, of the *Milwood* had left the trawler while the boarding was being made by the Icelandic coastguard, through the assistance of Commander Hunt of H.M.S. *Palliser*, to which the crew of the *Milwood* was being transferred. Skipper Smith left the scene on board another British trawler *Juniper* and immediately sailed away towards Scotland. The Icelandic Foreign Ministry, pointing out these facts in a note to the British Embassy dated 4 May 1963, concluded that:

It will be clear ... that Commander Hunt has been instrumental in the escape of the *Milwood's* skipper, and thus is responsible for his getaway from lawful arrest by the Icelandic coastguard vessel.

<sup>278</sup> G. H. Hackworth, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1941), vol. II, p. 279. A similar situation occurred in 1935 in connexion with the American vessel *Havana*, which was grounded on Mantanilla Shoal in the Bahamas. The case was settled in the same way as in the *Naiwa* incident (*ibid.*, p. 280).

<sup>279</sup> M. M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1965), vol. 4, pp. 565-566.

<sup>280</sup> United Nations, *Treaty Series*, vol. 237, p. 198.



The Icelandic Government stresses particularly that the decision to desist from the use of lawful force as long as possible so as not to endanger life and property of British nationals, was misused by the British Commander in order to make possible escape of an alleged felony from Icelandic jurisdiction. This flagrant and gross offence must be fully compensated for to Iceland by the British Government and proper punishment must be imposed upon those who are responsible.<sup>281</sup>

135. On 17 May 1963 the British Foreign Office, replying to the Icelandic note, said that the escape of the *Milwood's* skipper was in no way intentional on the part of Commander Hunt. The note said that "Skipper Smith's conduct and state of mind" during the transfer of the *Milwood's* crew to the *Palliser* had led Commander Hunt to the conclusion "that the only means open to him of preventing Smith from endangering his own life was to transfer him to the trawler *Juniper*". Commander Hunt took that action in the firm belief that the *Juniper* would be ordered to proceed to Reykjavik and would do so. The British note further stated that Her Majesty's Government deplored the fact that Skipper Smith evaded arrest in this manner and wished to tender their sincere regrets. They also accepted full responsibility for the action of H.M.S. *Palliser*.<sup>282</sup>

#### THE "THOR" INCIDENT BETWEEN ICELAND AND THE UNITED KINGDOM (1975)

136. During the night of 10 to 11 December 1975, the unarmed British civilian support vessels *Star Aquarius* and *Star Polaris* entered Icelandic territorial waters in the neighbourhood of Seydisfjord at their captain's discretion to seek, according to the statement made by the United Kingdom representative in the Security Council on 16 December 1975,<sup>283</sup> "shelter from severe weather, as they have the right to do under customary international law", in a "severe snowstorm with winds of force 8 gusting to force 9, and very high seas".\* The civilian defence vessel *Lloydsman* joined *Star Aquarius* during the morning near the entrance to Seydisfjord. At about noon on 11 December, the Icelandic coastguard vessel *Thor* came towards the two British vessels with the signal code "stop your vessel instantly". Soon afterwards, collisions occurred between the British vessels and the *Thor*.

137. In a note delivered to the Ambassador of the United Kingdom at Reykjavik on 12 December 1975, the Icelandic Government argued that the *Thor* had repeatedly been rammed by the British vessels, holding the United Kingdom Government responsible for all the damages sustained by the Icelandic ship.<sup>284</sup>

<sup>281</sup> British Institute of International and Comparative Law, *British Practice in International Law, 1963-I* (London), p. 17.

<sup>282</sup> *Ibid.*

<sup>283</sup> *Official Records of the Security Council, Thirtieth Year, 1866th meeting.*

<sup>284</sup> Quoted by the Icelandic representative in the Security Council (*ibid.*).

On 16 December 1975, the Icelandic representative in the Security Council further charged that the British vessels were *present in the Icelandic waters*, as a contingent of a British naval force, *for the sole purpose of preventing the Icelandic coastguard from enforcing Icelandic laws*.<sup>285</sup>

138. On 23 January 1976, the Icelandic representative submitted to the Security Council a document containing the transcripts made of the hearings held under the maritime inquiry conducted in two different courts of law in Iceland into the above incident.<sup>286</sup> In the covering letter to that document, the Icelandic Permanent Representative contended that:

There seems to be an even stronger reason to conclude [from the evidence contained in the document] that the British public vessels involved in this action entered an area inside internationally recognized territorial waters, *with the direct intent of creating and provoking an incident*,\* possibly with the objective of sinking one of the ships belonging to the fleet of the Icelandic coastguard ... commissioned for the purpose of dealing with fishery protection, salvage and rescue work, hydrographic research, surveying and lighthouse duties.<sup>287</sup>

139. Referring to the above Icelandic letter, the United Kingdom representative repeated his Government's position in a letter dated 18 February 1976 to the President of the Security Council as follows:

The documents circulated at the request of the Permanent Representative of Iceland obscure the basic facts of the incident, which are as follows: the *British vessels had been sheltering from a storm*\* and transferring water immediately before the incident. They were all unarmed. They were fired on by the Icelandic coastguard vessel. They did not provoke the incident in any way. The collisions were caused by the manoeuvring of the coastguard vessel at a time when the British vessels were making for the open sea.<sup>288</sup>

#### (c) Aerial incidents

140. Bad weather, the malfunctioning of navigational instruments and other conditions of *force majeure* are frequently invoked in diplomatic correspondence concerning aerial incidents.<sup>289</sup> A few examples of these frequent cases are recorded below.

#### INCIDENTS BETWEEN FRANCE AND GERMANY (1913)

141. On 3 April 1913, a German Zeppelin landed at Lunéville, France, carrying five uniformed officers

<sup>285</sup> *Ibid.*

<sup>286</sup> *Official Records of the Security Council, Thirty-first Year, Supplement for January, February and March 1976*, document S/11944.

<sup>287</sup> *Ibid.*, p. 21.

<sup>288</sup> *Ibid.*, documents S/11995, p. 106.

<sup>289</sup> See, for example, O. J. Lissitzyn, "The treatment of aerial intruders in recent practice and international law", *American Journal of International Law* (Washington, D.C.), Vol. 47, No. 4 (October 1953), p. 559; *Revue générale de droit international public* (Paris), 3rd series, vol. XXXII (Jan.-Mar. 1961), p. 97. See also I. C. J. *Pleadings, Treatment in Hungary of an aircraft and crew of the United States of America* (1954), pp. 14-15.



and seven civilians. According to the passengers, the airship, after leaving Friedrichshaven, *had lost the direction owing to foggy weather* and it was too late when they realized that they were navigating over French territory. Moreover, the propellers did not work, and so they decided to land. Before landing they did send the signal of distress. Finally, they added, they were in no way engaged in acts of espionage. On the following day, after an official inquiry, the Zeppelin was allowed to leave. On the same day, the German Ambassador in Paris, Mr. de Schoen, communicated to the French Foreign Minister, Mr. Pichon, the appreciation of the German Government for the satisfactory measures which the French Government had taken in the incident of "the involuntary landing of a German airship at Lunéville".<sup>290</sup>

142. On 22 April 1913, a German aeroplane with two pilots landed outside the village of Arracourt, France. According to the pilots, *the aeroplane had lost the direction in the fog* on its way from Darmstadt to Metz. Having realized their error, the pilots decided to make a forced landing. The explanations appeared to be sufficient to the French civil and military authorities. Towards the evening of the same day, in accordance with instructions received from Paris, the local authorities permitted the pilots to leave.<sup>291</sup>

#### INCIDENTS BETWEEN THE UNITED STATES OF AMERICA AND YUGOSLAVIA (1946)

143. On 9 August 1946, according to the United States authorities, an American C-17 air transport, which was on a regular flight from Vienna to Udine, Italy, and was trying to find its bearings after encountering bad weather over Klagenfurt, was attacked by Yugoslav fighters and as a result one passenger was seriously wounded and the aircraft was forced to crash land in a field near Kranj. In a communication to the United States Ambassador in Belgrade, Mr. Patterson, released to the press on 20 August 1946, the Department of State of the United States instructed him to demand of the Yugoslav Government the immediate release of the passengers and crew, stressing that the aircraft "was forced by the *hazards of navigation in bad weather\** over dangerous mountain barriers to deviate from their course and seek bearings over Yugoslav territory".<sup>292</sup>

144. On 19 August 1946 a similar incident occurred, killing five American aviators. The Yugoslav Government on its part charged the United States Government with a series of violations of Yugoslav air space by American aircraft. In a note dated

30 August 1946 to the Department of State, however, the Yugoslav Chargé d'affaires, Mr. Makiedo, stated that Marshall Tito had told Ambassador Patterson that "he has forbidden the shooting at planes that might fly over Yugoslav territory; presuming that for its part the Government of the United States of America would undertake the steps necessary to prevent these flights, except in the case of emergency or bad weather, for which arrangements could be made by agreement between American and Yugoslav authorities".<sup>293</sup>

145. In a note dated 3 September 1946 to the Yugoslav Chargé d'affaires, the Acting Secretary of State, Mr. Clayton, denied any intentional flights by American aircraft over Yugoslav territory and stated:

No American planes have flown over Yugoslavia intentionally without advance approval of Yugoslav authorities, unless forced to do so in an emergency. I presume that the Government of Yugoslavia recognizes that *in case a plane and its occupants are jeopardized, the aircraft may change its course so as to seek safety, even though such action may result in flying over Yugoslav territory without prior clearance.*

The Yugoslav Government has already received assurances from the United States Government that the United States planes will not cross Yugoslav territory without prior clearance from Yugoslav authorities, *except when forced to do so by circumstances over which there is no control, such as bad weather, loss of direction, and mechanical trouble.*<sup>294</sup>

146. In October 1946, the Yugoslav Government paid \$150,000 to the United States as indemnity for the loss of the lives of the five aviators who were killed on 19 August. In the note of acknowledgement of its receipt dated 8 October 1946, the American Ambassador to Yugoslavia repeated his Government's position of denying the Yugoslav contention that the Yugoslav Government had no responsibility for the loss of the unarmed transports shot down on 9 and 19 August, since these planes had not flown over Yugoslavia illegally but *for reasons beyond their control resulting from adverse weather conditions.* He therefore asked the Yugoslav Government to reconsider its refusal to make compensation for the loss of the two aircraft.<sup>295</sup>

#### INCIDENT BETWEEN BULGARIA AND TURKEY (1948)

147. On 9 February 1948, two Turkish military aircraft, whose pilots were, according to Turkish authorities, "inexperienced", entered Bulgarian air space. When they overflew the port of Sozopol, situated 64 kilometres south of the Turkish-Bulgarian border, Bulgarian forces shot them down after two warning signs were disregarded. One of the aircraft fell into the sea and the other made a forced landing. According to the communiqué of the Bulgarian authorities, the two aeroplanes flew "in conditions of

<sup>290</sup> *Revue générale de droit international public* (Paris), vol. XX (1913) pp. 395-398.

<sup>291</sup> *Ibid.*, p. 398.

<sup>292</sup> United States of America, *Department of State Bulletin*, (Washington, D.C.), vol. XV, No. 374 (1 September 1946) pp. 415-416.

<sup>293</sup> Quoted by the Acting Secretary of State, Mr. Clayton, in his note dated 3 September 1946 to Mr. Makiedo (*ibid.*, No. 376 (15 September 1946), p. 502).

<sup>294</sup> *Ibid.*, p. 504.

<sup>295</sup> See United States of America, Department of State press release of 9 October 1946 (*ibid.*, No. 381 (20 October 1946) p. 725).

excellent visibility", but the Turkish authorities said "the weather was rainy".<sup>296</sup>

INCIDENT BETWEEN CZECHOSLOVAKIA AND THE UNITED STATES OF AMERICA (1951)

148. On 8 June 1951, two American Thunderjet F.84 fighters made a forced landing near Prague. One was piloted by an American, Lieutenant Luther Roland, and the other by a Norwegian, Lieutenant Bjorn Johansen, who was undergoing training with the United States Air Force in Germany. The pilots were not released until 4 July, nearly a month later, after several *démarches* by the United States Government.<sup>297</sup>

149. In a reply given at the time to the United States Ambassador, then Mr. E. O. Briggs, Mr. Siroky, Vice-President of the Council and Minister for Foreign Affairs, stated that Czechoslovak air space had been violated 116 times by American aircraft since 15 June 1951. He concluded:

It seems doubtful that the overflight of Czech territory on this occasion was yet again due to *accident*.<sup>\*</sup> It seems more likely that the flight was undertaken for a specific object, Czech air space having been violated to a great depth and the two aircraft being in a state of combat readiness.<sup>298</sup>

This interpretation was rejected by Washington.

INCIDENT BETWEEN ALBANIA AND THE UNITED KINGDOM (1957)

150. On 31 December 1957, a British commercial DC-4 aeroplane was forced to land at Valona, Albania, after it was intercepted by Albanian fighters when on its way from Düsseldorf to Singapore. The Albanian authorities were reported to have contended that the British plane had entered Albanian air space and flown over its territory for nearly half an hour. The Italian radar stations indicated that the plane had gone a little off its route because of poor visibility on that day. The plane and the crew were finally released on 4 January 1958.<sup>299</sup> In a communiqué dated 6 January 1958, the United Kingdom foreign Office stated:

It is clear that the aircraft was, *as a result of bad weather conditions*,<sup>\*</sup> inadvertently over Albanian territory at the time of the incident...<sup>300</sup>

INCIDENT BETWEEN THE UNITED KINGDOM AND THE UNITED ARAB REPUBLIC (1965)

151. In connexion with an attack on Beihan State

by Egyptian aircraft, the British Colonial Secretary made the following statement at the House of Commons on 15 July 1965:

In reply to the protest [by the United Kingdom Government] ..., Her Majesty's Ambassador in Cairo has been assured by the ... authorities [of the United Arab Republic] that there are standing instructions to their aircraft not to cross the Federation's borders and that the recent attacks on the territory of the Federation of South Arabia ... can only have been a pilot's error and that further steps are being taken to ensure that the present instructions are more closely observed in the future.

... After a very careful examination of all the circumstances, ... we concluded that there was a strong presumption that the attacks were due to a pilot's error. We decided therefore to accept their explanation of this particular incident ...<sup>301</sup>

INCIDENT BETWEEN INDIA AND PAKISTAN (1967)

152. On 2 February 1967, an Indian Air Force fighter shot down a Pakistani aircraft which had entered Indian air space over the State of Punjab—where there were important military bases—and had not responded to an order made by the intercepting fighter. The Indian Government made a protest to the Pakistani Government against the violation of its air space. Meanwhile the Government of Pakistan announced that the aircraft in question was a civilian aeroplane belonging to the Aero-Club of Lahore, which was on a training flight conducted by a student pilot. The following day, the Indian Government recognized there had been an error, though stating that the identification marks of the aeroplane were similar to those of the Pakistani Air Force. The body of the pilot was returned to Pakistan.<sup>302</sup>

INCIDENT BETWEEN ISRAEL AND SAUDI ARABIA (1976)

153. On 12 April 1976, a Saudi Arabian military transport plane on its way from Damascus to Riyadh entered Israeli air space near Rosh Hanikra, an Israeli settlement on the Mediterranean coast near the Lebanese border. The plane was intercepted by Israeli fighters and forced to land at Tel Aviv. According to an Israeli who was present during the initial questioning of the crew, the plane strayed over Israel because the compass was defective and they found their navigational error only when Israeli jet fighters appeared around the plane.<sup>303</sup> The Saudi Arabian aeroplane was soon released and returned to Riyadh on 13 April.<sup>304</sup>

<sup>296</sup> *Revue générale de droit international public* (Paris), 3rd series, vol. XXXII, No. 1 (Jan.-Mar. 1961), pp. 102 and 103.

<sup>297</sup> *Ibid.*, pp. 108-109.

<sup>298</sup> *Ibid.*, p. 109.

<sup>299</sup> *Ibid.*, p. 98.

<sup>300</sup> Reproduced in *The Times* (London), 7 January 1958, p. 5.

<sup>301</sup> British Institute of International and Comparative Law, *British Practice in International Law, 1965-II* (London), p. 146.

<sup>302</sup> *Revue générale de droit international public* (Paris), 3rd series, vol. XXXVIII, No. 3 (July-Sept. 1976), p. 785.

<sup>303</sup> *The New York Times*, 13 April 1976, p. 2.

<sup>304</sup> *Ibid.*, 14 April 1976, p. 2.

**(d) Pollution**

## CONTAMINATION OF THE RIO GRANDE (1962)

154. Only a few months after the outbreak of a dispute between the United States of America and Mexico concerning the contamination of the Colorado River by excessive saline discharges, similar difficulties arose between the two States with regard to the Rio Grande. But this time Mexico was the party complained against. Dr. Manuel Tello, the Mexican Minister for Foreign Affairs, categorically denied that Mexico was responsible for the contamination of areas near the mouth of the Rio Grande by excess of salt. The Minister was refuting the rumour current in some American circles that the contamination was a kind of retaliatory measure by Mexico against the saline contamination of the Colorado River by Arizona farmers. Mr. Tello said that saline discharges had been reported in the Rio Grande since the summer of 1961, but that the discharges had been rapidly diluted and had not had any serious effect on the crops of Texas farmers. *What was involved was simply a very old natural phenomenon that had never caused difficulties in the past, unlike the pollution of the waters of the Colorado, which, by reason both of its recent origin and of the damage it was causing to lands in the Mexicali valley, was in law a wholly different matter.*<sup>305</sup>

**(e) Protection of offshore fisheries**

## FUR SEAL FISHERIES OFF THE RUSSIAN COAST (1893)

155. In 1893, in view of the abusive increase in the catch of fur seals near Russian territorial waters by United States and British fishermen, the Russian Government issued a decree prohibiting the taking of fur seals within 10 nautical miles from the Russian coastline and within 30 miles around the Komandorsky and Tulénew Islands. In a letter dated 12 February (24 February) 1893 to the British Ambassador, Sir R. Morier, the Russian Foreign Minister, Mr. Chickline, explained that the measure was taken in view of the "absolute necessity of immediate precautionary measures", owing to the proximity of the opening of the season, and declared that the Russian Government was ready to enter into negotiations among the three Governments in order to conclude an agreement for a better regulation of the catch. He went on further to characterize the measure as follows:

... I think I should emphasize the essentially precautionary character of the above-mentioned measures, which were taken under the pressure of exceptional circumstances and may be regarded as a case of *force majeure* and assimilated to cases of self-defence".<sup>306</sup>

<sup>305</sup> *Revue générale de droit international public* (Paris), 3rd series, Vol. XXXIII, No. 2 (Oct.-Dec. 1962), pp. 775-776.

<sup>306</sup> *British and Foreign State Papers, 1893-1894* (London, H.M. Stationery Office, 1899), vol. 86, p. 220.

**(f) Reimbursement of debts**

## PAYMENT OF CONTRIBUTIONS TO THE LEAGUE OF NATIONS (1927)

156. A resolution of the Assembly of the League of Nations of 28 September 1926 requested the Council of the League to arrange for a study of the legal position of States which did not pay their contributions to the League, with a view to giving the Assembly information on the matter. The report made thereon stated the following:

... the obligation to pay contributions falls under the sanction contained in Article 16 of the Covenant. Execution of the obligation of assistance for which the Covenant provides could not be assured if the institution through which this obligation is realised should find itself placed, owing to non-payment of contributions, in a difficult situation in regard to carrying out its functions. On the other hand, however, the obligation to pay contributions is not one of those the mere non-execution of which could lead automatically to expulsion from the league. *The failure in payment would have to be accompanied by circumstances of fact of a character to show the intention not to carry out the obligations arising from the Covenant.*<sup>307</sup>

## STATEMENT BY THE REPRESENTATIVE OF AUSTRIA IN THE ASSEMBLY OF THE LEAGUE OF NATIONS CONCERNING THE NON-EXECUTION OF ARBITRAL AWARDS (1930)

157. In a statement made at the 4th meeting of the First Committee, on 22 September 1930, during the eleventh session of the League of Nations Assembly, the representative of Austria, Mr. Hoffinger, said:

I only wish to mention one more point in our proposal which seems to be really important. If the Council is to take action in the case of a refusal to comply with an award or in the case of excessive slowness in doing so, it must in the first instance ascertain beyond all doubt whether the State in question is really in default or is really infringing its obligations under the Covenant. It may happen that the non-execution of an award is due to circumstances of *vis major* for which the State cannot be blamed. Consequently, action against that State would not be justified. I would quote as an example the case of a State ordered to pay a large sum to another State which, when payment fell due, was overwhelmed by some terrible catastrophe of nature, to the serious detriment of its financial resources. In such a case, the Council's duty would be rather to strike a balance between the just claims of the State to which the award had been made and the consideration due to an adversary overcome by disaster. The Council would certainly refuse to note that the Covenant had been infringed and decree coercive measures against the debtor State.<sup>308</sup>

<sup>307</sup> League of Nations, Council, Minutes of the Forty-fourth session of the Council, held at Geneva from 7 to 12 March 1927, 4th meeting (*Official Journal*, 8th year, No. 4 (April 1927), p. 381).

<sup>308</sup> League of Nations, Records of the eleventh ordinary session of the Assembly, Meetings of the Committees, Minutes of First Committee, 1930 (*ibid.*, *Special Supplement No. 85*, p. 39).

**(g) International terrorism and hijacking****ATTACK ON THE ROMANIAN LEGATION AT BERNE,  
SWITZERLAND (1955)**

158. On 12 February 1955, at midnight, five Romanian refugees residing in the Federal Republic of Germany attacked the Romanian Legation at Berne, wounding one of the Legation members mortally and causing damage to its property. On 15 February, the Vice-Minister of Foreign Affairs of Romania sent a note to the Chargé d'affaires of Switzerland at Bucarest, in which he drew the attention of the Swiss Government to "the grave responsibilities which it bore in these events, in conformity with its international obligations in the matter of the inviolability of the premises and archives of diplomatic missions and the persons and lives of their members". The Romanian Government sent three additional notes concerning the incident, the main arguments of which are summarized as follows:

The Swiss Government had not prevented the attack, as it was bound to do by reason of the protection which, under the rules of the law of nations, the receiving State owes to the diplomatic mission of the sending State. Contrary to that duty, it had been tardy in bringing the occupation of the Legation to an end and in arresting the perpetrators. Finally, it had not arranged for immediate assistance to be given to the wounded driver. In consequence, the Romanian Government asked for reparation in respect of the tangible and intangible losses it had suffered.<sup>309</sup>

159. In reply to these notes, the Swiss Federal Council stressed, *inter alia*, the impossibility of preventing the occurrence of the incident. Its contentions are summarized as follows:

The attack could be neither foreseen nor prevented. Once alerted, the police had taken all the measures the circumstances required and it was in any case for the police to decide which methods were appropriate in the situation. As soon as the driver was found, he had been taken to hospital.<sup>310</sup>

**HIJACKING OF A SWISS AEROPLANE (1970)**

160. On 6 and 9 September 1970, the Popular Front for the Liberation of Palestine seized four aeroplanes, including one of Swissair, coming toward Jordan and the United Arab Republic. The aeroplanes were forced to stop at Zerka, Jordan. The hijackers required the Swiss Government to free, within 72 hours, the members of their organization who had been kept in a Zurich prison because of their involvement in the attack against an Israeli aeroplane at Kloten in 1969. The Swiss Government decided to accept the demand in order to save the hostages.<sup>311</sup>

<sup>309</sup> G. Perrin, "L'agression contre la légation de Roumanie à Berne et le fondement de la responsabilité internationale dans les délits d'omission", *Revue générale de droit international public* (Paris), 3rd series, vol. XXVIII, No. 3 (July-Sept. 1957), p. 414.

<sup>310</sup> *Ibid.*, pp. 414-415.

<sup>311</sup> *Annuaire suisse de droit international*, 1971 (Zurich, 1972), vol. 27, p. 182.

161. On 14 June 1971, the incident at Zerka was brought up again in the Swiss National Council by a councillor, Mr. König. Replying to this question, the Chief of the Federal Political Department, Mr. Graber, made the following statement:

... according to the principles of international law, a State is not responsible for the unlawful conduct of persons under its jurisdiction but only for any negligence it may itself have committed in regard to preventing such conduct or bringing it to an end. While a State would be immediately responsible for an armed enterprise launched from its territory by certain of its organs, for example soldiers, it is not responsible for a similar enterprise launched by private persons, unless it is guilty of negligence in not preventing the enterprise or bringing it to an end. *This notion of negligence should not be understood in abstract terms. It depends in each case on the State's possibilities of concrete action. A State's responsibility, in other words, is thus diminished, to the point of complete exoneration, when its control over its own territory is weakened or hampered by reason of insubordination, disturbances, riots or civil war.\**

In the case of Jordan, which is the State primarily concerned in the incidents at Zerka; it is a known and certain fact that the Palestinian movements were defying the power of the Government and had almost entirely removed themselves from that power. *Accordingly, Jordan cannot be held responsible for the acts of persons who were no longer subject to its authority. It remains to be seen whether the Jordanian authorities did everything within their power to reestablish the authority of the State. The reply, I believe, admits of no doubt whatsoever, since in fact Jordan has engaged in a civil war and has thereby incurred the gravest risks, precisely in order to eliminate the dissidence of the Palestinian movements.\**

In other words, if the question of law raised by Mr. König is examined in the light of the facts of the situation,\* of which you are aware, the conclusion is that neither Jordan nor any other Arab State can be held legally responsible for the losses resulting from the hijacking of the aircraft.<sup>312</sup>

**(h) Civil wars, revolutions, insurrections, riots, mob violence, etc.****BELGIAN REVOLUTION (1830)**

162. Foreign States, such as Great Britain, Prussia, Brazil and the United States of America, claimed indemnities for property losses which their respective nationals suffered during the destruction, in October 1830, of the warehouse at Antwerp. In an official note from M. de Theux, Minister for Foreign Affairs, the Belgian Government explained its disallowance of the indemnity claimed by the British Government for the property of British nationals destroyed in the bombardment of the city. The note stated, *inter alia*, that

The consequences of open war are *forfaitous events or cases of force majeure, for which no-one incurs responsibility.\**<sup>313</sup>

In a letter dated 13 November 1839, addressed to Sir Hamilton Seymour, British Ambassador in Bruxelles, M. de Theux wrote:

<sup>312</sup> *Annuaire suisse de droit international*, 1972 (Zurich, 1973), vol. 28, pp. 249-250. [Translation by the Secretariat.]

<sup>313</sup> *British and Foreign State Papers, 1841-1842* (London, Ridgway, 1858), vol. 30, p. 224. [Translation by the Secretariat.]

I am confident ... that the facts and considerations set out in this note will be weighed as they deserve and that the result will be a sufficient justification of the reasons for which the Government does not consider itself bound to provide indemnification in respect of the losses suffered by your nationals.<sup>314</sup>

163. The principle laid down in the Belgian note was not denied by the British Government. The latter affirmed, that in the circumstances of the case all employment of force had become unnecessary and useless. The British position was stated in a memorandum addressed to the Belgian Government, transmitted to Sir Hamilton Seymour by letter from Viscount Palmerston, Secretary of State for Foreign Affairs, dated 19 March 1841. The memorandum stated, *inter alia*, that

In war, unavoidable necessity excuses many acts which lead to the destruction of private property; but in the present case the Belgian Government cannot set up this plea. The acts of the Belgian volunteers were not unavoidable, nor were they necessary, nor were they even calculated to be productive of any advantages to Belgium. They were wanton outrages tending to bring ruin on the town.<sup>315</sup>

#### INSURRECTION IN THE PARA DISTRICT OF BRAZIL (1835)

164. Having sustained losses during the insurrection in the Para district of Brazil in and about 1835, a number of British merchants made claims for compensation from the Brazilian Government. The Brazilian Minister for Foreign Affairs, however, refused to acknowledge the justness of the claims. Viscount Palmerston requested the advice of the British Law Officer, Mr. John Dodson, who gave a series of opinions on the matter. On 12 January 1836, he advised that His Majesty's Government be justified in requiring the Brazilian Government to grant compensation to the British merchants "if that Government had the power of preventing or suppressing the insurrection" and did not take adequate steps for that purpose.<sup>316</sup>

165. In a further report, dated 29 September 1838, Mr. Dodson made the following comments on a note addressed by the Brazilian Minister for Foreign Affairs to the British Chargé d'affaires at Rio de Janeiro, Mr. Hamilton, on the subject of the claim of certain British merchants:

... the arguments therein advanced are founded upon the supposition that the losses sustained by British subjects during the insurrection at Para, were occasioned by *circumstances beyond the power of the Brazilian Government either to foresee or to prevent.*\* The Brazilian Minister admits—what indeed could not well be denied—that strangers have an indisputable right to the protection of the law, and its authorities, even where no treaty exists conferring that right upon them, but contends that it would be manifestly absurd to exact such protection from a Government which in consequence of some criminal act of rebellion is unable to enforce it, and hereupon endeavours to justify his refusal to acknowledge

the justice of the British claims. But the demand made under Your Lordship's direction arises out of a very different state of things, and rests upon a very different foundation, viz. upon the fact as stated in Mr. Hamilton's report that when the news of the insurrection first reached Rio de Janeiro, the Brazilian government treated the event with apathy and indifference, that it disregarded all communications on the subject both private and official, and neglected to supply, as it might and ought to have done, a force sufficient to prevent the pillage and atrocities which were afterwards committed in the city of Para. The arguments adduced by the Brazilian Minister are, therefore, irrelevant and inapplicable to the real question at issue in the case ..., assuming the statement of Mr. Hamilton respecting the conduct and power of the Brazilian Government to be correct. I am of the opinion that Her Majesty's Government would be justified in making reprisals against Brazil if the Government of that country persists in its refusal to comply with the demands of Her Majesty's Government in this matter.<sup>317</sup>

On 3 April 1839, Mr. Dodson reported:

As it is not shown that the losses in question were occasioned by *the misconduct or wilful default\** of the Brazilian Government in not affording the requisite protection, I am of the opinion that His Majesty's Government is not entitled to insist upon the compensation demanded by the Memorialists.<sup>318</sup>

And on 22 July 1840, he reported in connexion with another claim:

Unless it shall appear that the losses now in question have arisen from the *wilful or culpable neglect\** of the Brazilian Government, I am of the opinion that Her Majesty's Government would not be justified in interfering to procure from the Brazilian Government the compensation required.<sup>319</sup>

166. Regarding the indemnification claim for the loss of the brigantine *Clio*, belonging to a British national, Mr. David Hill, which was plundered at Salinas near the mouth of the Para River in October 1835, after the master and four members of the crew had been murdered, the Law Officer, Mr. Dodson, gave, on 9 April 1836, the following opinion:

... the piratical act by which Mr. Hill's loss was occasioned, appears, so far as I am able to collect from the papers submitted for my consideration, to have been committed by persons who had by violence obtained possession of the country, and were engaged in carrying on a civil war against the Brazilian Government. Under these circumstances, I am of opinion His Majesty's Government would not be justified in complying with Mr. Hill's demand, and in requiring the Brazilian Government to indemnify him for the loss of his vessel, and of her freight.<sup>320</sup>

167. Asked to state the general principle of law relating to the right of foreign subjects to compensation when resident in a country which is undergoing civil war or insurrection, Mr. Dodson, on 28 December 1841, affirmed the plea of *diligentia quam in suis* as follows.

... I apprehend it to be a general rule of the law of nations that the subjects of one State resident within the territory of another have a right to claim from the government of the country in which they reside the same degree of protection which that government affords to its own subjects, and that unless such protection is withheld from them, they cannot justly claim compensation for the losses sustained in consequence either of foreign or internal war. A British subject resident in a foreign country cannot stand in a more favourable situation than the native inhabitants ...

<sup>314</sup> *Ibid.*, p. 223. [Translation by the Secretariat.]

<sup>315</sup> *Ibid.*, p. 232.

<sup>316</sup> A. D. McNair, *International Law Opinions* (Cambridge, University Press, 1956), vol. II, p. 247.

<sup>317</sup> *Ibid.*, p. 249.

<sup>318</sup> *Ibid.*

<sup>319</sup> *Ibid.*, p. 250.

<sup>320</sup> *Ibid.*, p. 248.

It does not appear to me that there are any special circumstances in the Para case which should make it an exception to the general principles above mentioned.<sup>321</sup>

#### OCCUPATION OF PUERTO CABELLO BY VENEZUELAN REVOLUTIONISTS (1836)

168. In 1836, some Venezuelan revolutionists—the so-called *reformistas*—took possession at Puerto Cabello of a quantity of flour belonging to a Mr. Litchfield, an American citizen. The United States Government demanded compensation from Venezuela, which refused to entertain the claim on the ground of *force majeure*. The United States thereupon dropped the matter.<sup>322</sup>

#### MOB VIOLENCE IN ATHENS, GREECE (1847)

169. In 1847, the Greek Government tried to suppress the popular custom of burning at Easter an effigy of Judas Iscariot. A report was spread, however, to the effect that this interference with the popular custom was due to the Chevalier Pacifico, commonly called Don Pacifico, who was a British subject of the Jewish faith. As a consequence, his house was attacked in the middle of the day by several hundred persons. According to the British Minister at Athens, Sir Edmund Lyons, the mob was “aided, instead of being repressed, by soldiers and gendarmes, and who were accompanied and encouraged, if not headed, by persons whose presence naturally induced a belief, amongst the soldiers and the mob, that the outrages they were committing would be indulgently treated by the Government”. The Minister presented this complaint to the Greek Government, together with a suggestion of compensation, on 26 April 1847. No answer being made to that complaint, the Minister sent a formal demand for redress to the Greek Foreign Minister, by direction of Lord Palmerston, on 14 September 1847.<sup>323</sup> In his opinions dated 2 and 13 July 1847, the British Law Officer, Mr. J. Dodson, elaborated his reasoning for holding the Greek Government responsible for the losses of Don Pacifico. In the first opinion, he argued:

... If, in spite of the notice given to him by Sir Edmund Lyons, Mr. Coletti [Greek Minister of the Interior] and the Greek authorities used no endeavour to check the outrage, I am of opinion that Her Majesty's Government would be entitled to demand compensation for the losses sustained by Mr. Pacifico; but if on the other hand the Greek authorities acted with due promptitude, and used their best, although ineffectual, exertions to afford defence to Mr. Pacifico, I think that Her Majesty's Government would not be borne out in holding the Greek Government to be responsible for the losses of Mr. Pacifico.<sup>324</sup>

<sup>321</sup> *Ibid.*, p. 250.

<sup>322</sup> Arias, *loc. cit.*, p. 747.

<sup>323</sup> Moore, *op. cit.*, pp. 852–853.

<sup>324</sup> McNair, *op. cit.*, p. 239.

In the second opinion, the Law Officer contended:

... I take leave to say that the inefficiency therein adverted to, of the exertions to afford defence to Mr. Pacifico, had reference to the promptitude and activity of the authorities in sending assistance, rather than to the amount of force which was, or ought to have been, employed on the occasion.

According to the statement of Mr. Pacifico, the outrage complained of lasted about an hour and a half, and if Mr. Coletti, and the other Greek authorities, did not as soon as they received information of what was going on, take the earliest means of repressing it, the blame and consequent responsibility for the damage must rest with the Greek Government.<sup>325</sup>

#### INSURRECTION IN SICILY (1848)

170. As a result of the bombardment of the city of Messina during the insurrection which took place in Sicily in 1848, some British residents in the city sustained losses for which claims were made to the Neapolitan Government. Replying to the question whether the British Government was called upon to support the claims, the British Law Officer, Mr. Dodson, reported on 3 July 1848 that the subjects of neutral States having property in a besieged or bombarded city had not by the law of nations any right to compensation arising from the “unavoidable incidents of war”. He continued:

Unless therefore it could be satisfactorily shown (which in my humble judgment has not been yet done in respect of the properties now in question) that the destruction thereof was wilful and not the effect of *mere accidental occurrence*\* in the legal exercise of those rights to which the Neapolitan Government had recourse with a view of reducing to obedience that part of its subjects which had taken up arms against its authority, I am of opinion that the Government of Naples could not with propriety be called upon to make compensation to the sufferers.

The above rule was recognized and acted upon by His Majesty's Government in 1830 in the case of the bombardment of Antwerp and also of that of Mogador in 1844, and upon various other occasions.

The case of the property destroyed in the Porto Franco reported on by me on the 25th of March last, formed an exception to that which I have stated to be the general rule, because it was there proved that the destruction was intentional and wanton, without provocation and without necessity.<sup>326</sup>

171. Afterwards, hostilities in Sicily were resumed, causing various British merchants to suffer losses. The Neapolitan Government declared that it would not be answerable for British losses arising out of such hostilities. Responding to the claimants' request for protection and support of the British Government, the Law Officer, Mr. Dodson, reported, on 3 May 1849, as follows:

... I see no reason to depart from the opinion expressed in my report of the 20th ultimo, viz. that the Neapolitan Government might, notwithstanding its declaration, be held responsible for losses occasioned by any wanton and unnecessary attack by its forces upon the property of British subjects in Sicily. I cannot however take upon myself to say that the Neapolitan Government must be answerable for all losses which may arise to British subjects in that island in consequence of the resumption of hostilities,

<sup>325</sup> *Ibid.*, p. 240.

<sup>326</sup> *Ibid.*, p. 251.

or even of the mode in which the warfare is said to be carried on. Modern usage has certainly modified and softened to a great extent the usages of war, especially with regard to the capture and destruction of private property upon land, but, where such property is destroyed by the ordinary operations of war, or in the case of towns bombarded, or taken by storm, or of a country laid waste for the purpose of securing a frontier or stopping the progress of an enemy or of making approaches to a town intended to be attacked, I apprehend that redress cannot be demanded for the suffering parties, notwithstanding they may by birth be subjects of a neutral State. Still less do I think that neutral subjects have a right to demand compensation from the Government for the destruction of property belonging to and in the possession of persons the subject of the other belligerent merely because those persons are indebted to them, or because they may happen to have a lien upon the property.<sup>327</sup>

#### INSURRECTION IN TUSCANY (1849)

172. In 1849, the British Government, on behalf of British residents in the Duchy of Tuscany, asked, on the ground of war damage, for indemnities from that Duchy and Austria. In an Austrian note dated 14 April 1850, Prince Schwarzenberg doubted if there was any State which could claim for its citizens residing in another country advantages and privileges which the inhabitants of the country did not enjoy themselves. Since the matter was not settled, the Government of Tuscany attempted to refer the case to arbitration and approached the Russian Government. The latter, however, was of the opinion that there was nothing for arbitration, because the case was clearly against the British residents. Concurring in the Austrian view, Count Nesselrode stated in a Russian note dated 2 May 1850:

According to the principles of international law as the Russian Government understands them, it cannot be admitted that a sovereign *forced by the rebellion*\* of his subjects to retake a town occupied by the insurgents is under an obligation to indemnify any aliens who may have been the victims of losses or damage of any kind whatsoever in the midst of such circumstances.<sup>328</sup>

The British Government then abandoned the claim.<sup>329</sup>

#### RIOT AT NEW ORLEANS, UNITED STATES OF AMERICA (1851)

173. In August 1851, during a riot at New Orleans directed against the Spanish Consul, Mr. Laborde, and Spanish residents there, the Spanish Consulate and several stores were raided by mobs. The Spanish Consul, who had been, according to the Spanish Minister at Washington, Mr. Calderón de la Barca, at "the mercy of a ferocious rabble" and without protection, left for Havana. The Spanish Minister de-

manded that the United States pay indemnities to the Consul and to the other Spaniards who had sustained damages. In a communication dated 13 November 1851 to the Spanish Minister, the Secretary of State of the United States, Mr. Webster, said that his Government had "manifested a willingness and determination to perform every duty which one friendly nation has a right to expect from another" in such a case, although he made a distinction between the rights of the Consul and those of other Spanish citizens.<sup>330</sup>

#### MUTINY IN CHILE (1852)

174. In 1852, an English vessel *Eliza Cornish* and its cargo were seized by Chilean convict mutineers at a Chilean penal settlement in the Straits of Magellan. The owners of the vessel and the cargo requested the British Government to intervene and obtain compensation from the Chilean Government. On the question of whether the Government was justified in taking such action, the British Law Officer, Mr. Harding, stated in his opinion of 13 July 1852 the following:

*I assume that the Chilean Government was not guilty of any gross, or wanton negligence,\* as to the strength or composition of the garrison, and that none of its officers were previously cognizant of, or conniving at, what subsequently occurred, but that it acted 'bona fide' throughout.\*<sup>331</sup>*

#### ACTS OF INSURGENTS IN VENEZUELA (1858)

175. During the "revolutionary movement of March" and frequent guerrilla action in 1858 in Venezuela, foreign residents suffered losses of various kinds. On 27 August 1859, the Governments of Great Britain, Spain and the United States of America filed with the Venezuelan Government a joint claim for the damages sustained by their respective nationals as a result of the actions of revolutionists and also of government agents.

176. After a series of negotiations between Venezuela and Spain, the Government of Venezuela received on 10 September 1860 an ultimatum from Mr. Romea, Chargé d'affaires of Spain, asking:

*First*, that the perpetrators of the murders of Her Majesty's subjects should be handed over to the courts to undergo the punishment they deserve, and if one or more of them have been released as a result of the granting of pardons for political crimes, let them be returned to prison because of their involvement in common crimes, and, *second*, that the Government of Venezuela undertakes to compensate Her Majesty's subjects for all damage already caused them or which may in future be caused them by the constitutional and federal authorities.<sup>332</sup>

The Venezuelan Government, while accepting the first of the above two points, repeated its position on the second point. It promised to compensate

<sup>327</sup> *Ibid.*, p. 252.

<sup>328</sup> C. Strupp, "Responsabilité internationale de l'Etat en cas de dommages, causés aux ressortissants d'un Etat étranger en cas de troubles, d'émeutes ou de guerres civiles", *The International Law Association Report of the Thirty-first Conference* (Buenos Aires, 1922) (London, Sweet and Maxwell, 1923), vol. I, pp. 131-132.

<sup>329</sup> *Ibid.*, p. 132.

<sup>330</sup> Moore, *op. cit.*, pp. 811-812.

<sup>331</sup> McNair, *op. cit.*, p. 253.

<sup>332</sup> Pulido Santana, *op. cit.*, p. 49.



all legally verified damage and injuries already caused them or which may in future be caused them by the constitutional authorities; it cannot, however, compensate the damage and injuries occasioned by the factions, because such compensation is categorically prohibited under a law in force in the Republic which is based on the generally accepted principle that injuries sustained by foreigners as a result of internal disturbances *are disasters for which Governments cannot humanly be held responsible, just as they are not answerable for fires, plagues, earthquakes or other disorders arising from physical causes.*<sup>333</sup>

As anticipated in the ultimatum, the Spanish Government broke off diplomatic relations with Venezuela. About a year later, however, on 12 August 1861, an agreement was signed between the two Governments providing, *inter alia*, that

Spanish subjects who have sustained injuries at the hands of the factions are obliged to show negligence on the part of the lawful authorities as regards the adoption of appropriate measures to protect their interests and persons and to punish or check the culprits.<sup>334</sup>

177. Meanwhile, the British Government requested a legal opinion of the Law Officers as to the extent to which the Venezuelan Government could be held responsible for injuries inflicted on property or persons of British subjects or other foreign subjects during the same incidents. The Law Officers, Mr. J. D. Harding *et al.*, reported in their opinion dated 25 February 1861 as follows:

As a matter, however, of international right, we do not think that the Venezuelan Government can be held responsible generally for injuries inflicted on the properties or persons of British subjects, or other foreigners, resident in the country, by insurgents engaged in open and armed hostility to the Government; and which injuries *the Government had not the power to prevent.*\* A foreigner cannot claim to be placed in a better situation than the natural-born subjects of the country. If the country be invaded by an enemy, and the foreigner's property is injured by the invading army, he has no title to claim compensation. Injury caused by insurgents or rebels is subject to the same rule. If, indeed, the Government, having the power to do so, neglects or wilfully abstains from putting down insurgents, it may be regarded as an accomplice in the act complained of, and there would be a right of the foreigner to demand compensation.

In the case before us, we find no sufficient ground for alleging that the injuries complained of would not have occurred but for gross neglect on the part of the Venezuelan Government; and we do not think, therefore, that the facts, as far as we can ascertain them, would justify a demand for compensation.<sup>335</sup>

#### EVENTS IN CENTRAL AMERICA (1860)

178. In a note dated 26 November 1860, the Secretary of State of the United States of America, Mr. Cass, wrote:

A Government is responsible only for the faithful discharge of his international duties, but not for the consequences of illegal enterprises of which it had no knowledge, or which the want of proof or other circumstances *rendered it unable to prevent.*<sup>336</sup>

#### INSURRECTION IN SANTO DOMINGO (1861-1863)

179. During an insurrection against the Spanish Government in Santo Domingo in 1861, British citizens suffered losses due to the operations of the Spanish authorities and the troops acting under their orders engaged in suppressing the insurrection. Advising on the position which the British Government should take regarding their claims, the Law Officers, Mr. Palmer *et al.*, stated in their opinion dated 26 January 1864:

... with respect to all these claims, we understand the circumstances in which the loss of property has happened to be the same, namely, that the losses were the consequence of the general military operations of the Spanish forces against the insurgents in San Domingo, not the consequence of any special acts of military insubordination or excess, unnecessary for the general purposes of the war, and brought home to particular persons guilty of such acts.

We are of opinion that all foreign subjects domiciled in a place or city which suffers during the time of war from the *necessary operations of war,\** are to be considered, with respect to any damage which their property may receive, as on the same footing, and no other, with the native subjects in the same city or place, and that they have no other claim for indemnity than those subjects may have ... Such losses do not confer any title on the Government of the foreign subject to demand compensation or indemnity for his losses so incurred upon principles of international law.<sup>337</sup>

180. A similar position was taken by the Department of State of the United States of America in a communication dated 18 September 1896 of the Acting Secretary of State, Mr. Rockhill, which reads as follows:

A claim was presented to the Government of Spain for losses sustained by a citizen of the United States at Puerto Plata during an insurrection against the Spanish Government in Santo Domingo in 1863. The Spanish Government replied that every possible measure had been taken for the protection of foreigners in Santo Domingo, but that the Spanish troops were obliged by the insurgents to abandon Puerto Plata, and that Spain under the circumstances was not liable for losses caused by the insurgents. The Department of State seems to have acquiesced in this decision, and, after a lapse of thirty years, declined to reopen the case.<sup>338</sup>

#### CIVIL WAR IN THE UNITED STATES OF AMERICA (1861-1865)

181. Certain British residents in the state of Missouri sought compensation for losses or destruction of their property which had occurred during the Civil War in the United States. In an opinion dated 21 October 1861, reporting on that case, the British Law Officers, Mr. J. D. Harding *et al.*, stated:

... as a general principle, when British subjects become voluntarily domiciled in a foreign country in which a civil war occurs, the "*de facto*" Government is not to be held responsible to that of Her Majesty for losses or destruction of property caused by those who are in arms against it, and whose actions *it has not the power of controlling,\** should the party by whose officers or troops, or under whose authority, such losses or destruction have been

<sup>333</sup> *Ibid.*, p. 50.

<sup>334</sup> *Ibid.*, p. 53.

<sup>335</sup> McNair, *op. cit.*, p. 260.

<sup>336</sup> Moore, *op. cit.*, vol. VII, 1906, p. 928.

<sup>337</sup> McNair, *op. cit.*, p. 261.

<sup>338</sup> Moore, *op. cit.*, vol. VI, p. 955.



inflicted, ultimately succeed in acquiring power, and to be recognised by Her Majesty's Government as the sovereign Government, it may be open to Her Majesty to insist upon compensation in respect of such losses and injuries; but it is scarcely possible to lay down beforehand, and without regard to the *particular circumstances of the case*,\* the principles by which the conduct of Her Majesty's Government would be in effect guided, as to the compelling payment of such compensation.

With regard to losses or destruction of property caused to British subjects exclusively by the officers or troops, or by those acting by the authority or on behalf, of the Government under whose authority such British subjects are living at the time, we can only say that as a general principle such Government *is*\* responsible for them; and that the fact of their having been committed during the existence of a civil war, although it may sometimes palliate or extenuate the conduct of those concerned, will not exonerate the Government from its general responsibility. *Our observations on this head are of course confined to loss or destruction of property not caused by accident,\* or by persons unknown; they do not extend to such losses, as although consequent upon, and indirectly caused by, the existence of the Civil War, are yet not the result of illegal violence on the part of the authorities, military or civil ...*<sup>339</sup>

182. An American ship, the *Alleghanian*, carrying guano owned by the Government of Peru was attacked on 28 October 1862, while it was anchored in the Chesapeake Bay, by a party of men belonging to the Confederate Navy, who were under the command of two commissioned lieutenants in that service. These officers were at that time acting under special orders of the Confederate Secretary of the Navy. The ship burned and sank with her cargo. The Peruvian Minister to the United States, Mr. Barreda, whose Government had not formally acknowledged the Confederacy as a belligerent Power, presented a claim to the United States for the loss of the cargo.<sup>340</sup>

183. On 9 January 1863, the Secretary of State of the United States, Mr. Seward, sent a reply to the Peruvian Minister, in which he agreed with the Minister "in pronouncing the destruction of the guano in question a premeditated and unjustifiable act, which was committed with full knowledge of its nature and character by the party who effected its destruction". He further declared that the United States "would acknowledge the responsibility which the unjustifiable acts of the destroyers of the *Alleghanian* imposes upon it". After advancing some considerations concerning the determination of that responsibility, Mr. Seward concluded as follows:

This Government regrets as sincerely as the Peruvian Government can that its efforts to accomplish these objects have been thus far unsuccessful. What has happened, however, in the case of the *Alleghanian* has occurred *without any fault whatever on the part of this Government, has been committed by disloyal citizens over whom, through the operations of civil war, it has temporarily lost its control.\** The Government, moreover, has spared no reasonable effort to redress the injuries which have been committed and to repair the losses which have been incurred. It will still prosecute these efforts diligently and in good faith. The President is impressed too deeply with the [sense of] justice of the Republic of

Peru to doubt that this answer to Mr. Barreda's representations will be found entirely satisfactory.<sup>341</sup>

184. In his reply dated 30 January 1863, the Peruvian Minister maintained the liability of the United States.<sup>342</sup>

#### THE PARIS COMMUNE IN FRANCE (1871)

185. The British Law Officers were called to report to their Government on several occasions on cases arising out of the Paris Commune in France in 1871. The general principle advanced in those reports would seem to be that, in the *absence of negligence* on the part of the lawful Government in failing to prevent or suppress the insurrection, France could not be held responsible for losses and damages sustained by British subjects; the plea of *diligentia quam in suis rebus* was referred to. Thus, in connexion with a claim relating to a certain quantity of coal shipped by a British company for delivery in Paris and seized by agents of the Commune, the British Law Officers, Mr. Collier *et al*, stated in an opinion dated 29 April 1871 the following:

... we are of opinion that the French Government cannot properly be held responsible to Her Majesty's Government for the injuries done to the property of British subjects *in parts of France which are not under the political control of that Government,\** and therefore that Mr. Johnson has no claim of right against the Government at Versailles for compensation on account of injuries done to his property by the agents of the Commune at Paris.

Whether the French Government hereafter, or if it should succeed in re-establishing its authority in Paris and mastering the insurrection, will be disposed to compensate foreigners for requisitions made upon their property by the insurgents, ... we would observe that a distinction may well be made by that Government between the losses which have resulted to British subjects in France from the invasion of that country by the German armies during the late war between France and Prussia, and losses resulting to British subjects from the civil war which at present exists in France, and that whilst the French Government will be justified in refusing to make the slightest compensation in the former case to British subjects for the destruction of their property by the subjects of other Powers, they may feel called upon in the latter case, but only as a matter of equity, to make some compensation to British subjects for losses inflicted upon them by French subjects, notwithstanding there has been no effort wanting on the part of that Government to put down the insurrection. We say "only as a matter of equity" because we think that when a Government has spared no effort on its part to control an insurrection, foreigners can have no claim of right against it for compensation on account of losses to which they have been exposed, in common with the subjects of the Government, and *from which the Government has been powerless to protect its own subjects.\**<sup>343</sup>

#### UPRISING IN ARGENTINA (1871)

186. In 1871, several foreign residents suffered damages in Argentina owing to the acts of insubordinate gauchos. The diplomatic agents made represen-

<sup>339</sup> McNair, *op. cit.*, pp. 254-255.

<sup>340</sup> Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, D.C., U.S. Government Printing Office, 1898), vol. II, pp. 1621-1622.

<sup>341</sup> *Ibid.*, p. 1624.

<sup>342</sup> *Ibid.*

<sup>343</sup> McNair, *op. cit.*, pp. 262-263.

tations to the Argentine Government complaining of the lack of security for foreign immigrants. On 13 March 1872, the British Law Officer, Mr. Twiss, reported to his Government that no compensation could be claimed on behalf of British subjects for damage inflicted as the result of "a rising of the gauchos", Argentine subjects, unless there had been "default on the part of the local authorities in affording due protection to British subjects".<sup>344</sup> Earl Granville, in his note of 26 March 1872 to the British Chargé d'affaires at Buenos Aires, instructed him to the effect that, if he found on careful inquiry that there had been default on the part of the local authorities, a representation should be made to the Argentine Government, and that he should then proceed to demand proper compensation for the injury inflicted. "Should no such default appear", he continued, "calamitous as this result of the rising has been to British subjects, Her Majesty's Government regret that they cannot properly put forward a claim in their behalf."<sup>345</sup>

#### CARLIST INSURRECTION IN SPAIN (1874)

187. Commenting on whether the British Government was justified in making representations to the Spanish Government on behalf of the British citizens who had suffered losses at Cartagena during the bombardment of that city by Carlist insurgents, the British Law Officers, Mr. Baggallay *et al.*, reported in an opinion dated 9 May 1874:

As a matter of international right and a subject for diplomatic interference, a government cannot be held responsible for injuries inflicted on the property or persons of foreigners resident in the country by insurgents engaged in armed hostility to the government, and which injuries the Government had not the power to prevent.\*<sup>346</sup>

In a subsequent opinion, dated 7 December 1874, the same Law Officers further stated:

... we are of opinion that British subjects carrying on their business or resident in Spain have no claim upon the Spanish Government for compensation for the losses which they may have sustained by the acts of the [Government] troops and [Carlist] insurgents during the Civil War, except in the event of the Spanish Government compensating Spanish subjects who may have incurred similar losses.<sup>347</sup>

#### MOB VIOLENCE AT ACAPULCO, MEXICO (1875)

188. An American citizen was killed in a mob attack against a Protestant church at Acapulco. In a dispatch dated 23 February 1875 to the American Minister in Mexico, Mr. Foster, the Secretary of State of the United States, Mr. Fish, said:

... Governments are not usually accountable in pecuniary damages for homicides by individuals. *All that can fairly be ex-*

*pected of them is that they should in good faith, to the extent of their power, prosecute the offenders according to law.*<sup>348</sup>

#### MOB VIOLENCE AT DENVER, UNITED STATES OF AMERICA (1880)

189. On 31 October and 1 November 1880, mob violence occurred at Denver, Colorado, in which certain Chinese residents suffered serious injuries in their persons and property. The Chinese Minister made a request to the United States Government, among others, that the owners of the wantonly destroyed property should in some way be compensated for their losses. In a letter dated 30 December 1880, the Secretary of State of the United States, Mr. Evarts, replied to the Chinese Minister as follows:

... Such incidents are peculiar to no country. Neither the United States nor China are exempt from such disasters. In the case now under consideration, it is seen that the local authorities brought into requisition all the means at their command for the suppression of the mob, and that these means proved so effective that within twenty-four hours regular and lawful authority was re-established, the mob completely subdued, and many of the ring-leaders arrested.

Under circumstances of this nature when the Government has put forth every legitimate effort to suppress a mob that threatens or attacks alike the safety and security of its own citizens and the foreign residents within its borders, I know of no principle of national obligation, and there certainly is none arising from treaty stipulations which renders it incumbent on the Government of the United States to make indemnity to the Chinese residents of Denver, who, in common with citizens of the United States, at the time residents in that city, suffered losses from the operations of the mob. Whatever remedies may be afforded to the citizens of Colorado or to the citizens of the United States from other States of the Union resident in Colorado for losses resulting from that occurrence, are equally open to the Chinese residents of Denver who may have suffered from the lawlessness of the mob. This is all that the principles of international law and the usages of national comity demand.<sup>349</sup>

#### THE SAIDA INCIDENT, ALGERIA (1881)

190. By a note dated 30 June 1881, the Spanish Ambassador at Paris, Duke Fernan-Nuñez, demanded that the French Government indemnify Spanish residents at Saida, Algeria, who had suffered physical and property losses during the internal troubles there. The French Foreign Minister, Mr. Saint-Hilaire, replied, in a note sent to the Spanish Foreign Minister, as follows:

It is known that in similar circumstances France has never made a distinction on the ground of nationality and that in its territory resident aliens have always been allowed to benefit from measures of indemnification taken in favour of nationals.

Such measures of indemnification plainly cannot in the present case derive from a legal obligation. The events at Saida belong to the category of *inevitable circumstances to which all those dwelling in the land are exposed, as though to the ravages of a plague, and*

<sup>344</sup> *Ibid.*, p. 265.

<sup>345</sup> Arias, *loc. cit.*, p. 748.

<sup>346</sup> McNair, *op. cit.*, p. 265.

<sup>347</sup> *Ibid.*

<sup>348</sup> Moore, *op. cit.* vol. VI, p. 815.

<sup>349</sup> *Ibid.*, pp. 821-822.

for which the State cannot be held responsible.\* Very recently, indeed, the King's Government itself relied on this universally acknowledged theory to reject the obligation to make indemnification in respect of damages resulting from domestic disturbances or civil war; in the circumstances, the Government will not be surprised that the French Government feels bound to affirm that, in accordance with the same rules of international law, that it is not bound to indemnify the victims in Algeria.<sup>350</sup>

191. In reply to the above note, Duke Fernan-Núñez argued in a note addressed to Mr. Saint-Hilaire dated 31 July 1881:

The ever deplorable hazards of war afford foreign nationals means of avoiding the disasters they occasion.

When, however, great undertakings have been established under the protection of the forces of a mighty nation, when these undertakings have come, as they developed, to constitute the principal foundation of the wealth of a colony, and repeated experience has shown that the labour to which they are due can alone sustain these industries, *their destruction cannot be considered as an ordinary case of force majeure born of the hazards of war.\**

In the only cases which might offer an analogy, although remote, to the present case, the Spanish nation has not hesitated to indemnify damages that have been reported to it and duly justified...<sup>351</sup>

192. In a note addressed to the Spanish Government, annexed to a note to Duke Fernan-Núñez, dated 8 August 1881, Mr. Saint-Hilaire, recalling similar incidents in Spain and Cuba, where the French Government had filed no claims, stated the following:

It [the French Government] has considered that in settling abroad its nationals voluntarily accepted to share in the good as well as the bad fortune of the country; it has not wished either to ascertain whether the local authority has incurred a certain responsibility, or to assess the means employed to restore order, or to adduce as arguments successive changes in the command of the regular forces. These are matters that can be judged only by the sovereign State.

The same considerations surely apply, with even greater force, to the regrettable events of which the province of Oran was recently the scene. No-one is unaware of the peculiar situation of the undertakings on the high plateaux that results from the presence in the neighbourhood of turbulent and fanatical tribes. The colonial administration is ever vigilant to maintain order there; its own interest is a guarantee of this, and the tranquillity that has prevailed in previous years attests that it ordinarily succeeds in doing so. These conditions are known to both the nationals and the aliens who come there of their own accord to seek the advantages of assured and profitable labour; among the risks they faced, they must have reckoned the possibility of native uprisings, the outbreak of which sometimes cannot be foreseen, and they cannot justly seek to hold the French authorities responsible therefor. Their situation with regard to the Government of the Republic is thus identical to that in which the Cuban insurrection and the Carlist war placed French residents vis-à-vis the King's Government; in neither situation can a right to indemnification be asserted, but in both there are similar grounds for the award of equitable compensation.<sup>352</sup>

193. In a note dated 19 September 1881 to Mr. Saint-Hilaire, Duke Fernan-Núñez wrote that the Spanish Government had never claimed an indem-

nity in the strict and juridical sense of the term, adding that it had always supported the doctrine that "national responsibility is incurred only by the voluntary, intentional and deliberate action of the public powers". He went on to say that what his Government was asking for was "compensation spontaneously and freely awarded by a State, for the purpose of indemnification and relief, in the face of misfortunes which occurred in the national territory".<sup>353</sup>

194. The French Government accepted this basic position and, in a note of the same date addressed to Duke Fernan-Núñez, Mr. Saint-Hilaire wrote:

It is recognized that in strict law neither of the two States is under a legal obligation to indemnify the claimants; but it is agreed, also on both sides, that in equity the situation of the victims is worthy of consideration on all counts and such as to create grounds for the award of compensation, which each of the two Governments reserves the right to assess...<sup>354</sup>

#### INSURRECTION AT SFAX, TUNISIA (1881)

195. The residence of the Italian consular agent at Sfax, Tunisia, and those of other Italians, were occupied by French troops which had intervened to suppress a rebellion. The Italian Government protested to the Tunisian Government on the ground that the occupation violated the provisions of article 20 of the Treaty of Friendship and Trade of 8 September 1868 between Italy and Tunisia, according to which the immovable property of Italian citizens in Tunisia was inviolable.<sup>355</sup>

196. In a letter dated 10 August 1881 to the Acting Italian Consul-General at Tunis, Mr. Raybaudi, the Minister Resident of France at Tunis, Mr. Roustan, who was in charge of the Foreign Affairs of the Bey, wrote:

The Government of His Highness regrets the temporary infringement of the right of possession of the Italian property in question. However, it must point out that this infringement arose in a case of *force majeure* and was one of the acts necessitated by, and a consequence of, the military operation which restored the Bey's authority in the insurgent town.<sup>356</sup>

Referring to the above letter, the Italian Foreign Minister stated in a letter to Mr. Raybaudi, dated 17 August 1881, the following:

The representative implicitly admits, by the expressions of regret contained in his note, the irregularity of the occupation; however, he seeks to justify it by invoking the circumstance of *force majeure*. In this connexion, it would not be inappropriate to observe that, since the Italo-Tunisian treaty clearly stipulates the inviolability of Italian immovable property, it cannot be understood how justification can be sought by invoking a case which was certainly not one of *force majeure* for the French troops and officers, who had entered Sfax after a bombardment which had completely dislodged the enemy. In any event, even if the initial act of

<sup>350</sup> A.-C. Kiss, *Répertoire de la pratique française en matière de droit international public* (Paris, Centre national de la recherche scientifique, 1965), vol. III, p. 618.

<sup>351</sup> *Ibid.*, p. 619.

<sup>352</sup> *Ibid.*, p. 620.

<sup>353</sup> *Ibid.*, p. 621.

<sup>354</sup> *Ibid.*

<sup>355</sup> Società italiana per l'organizzazione internazionale - Consiglio Nazionale delle Ricerche, *op. cit.*, pp. 872 and 874.

<sup>356</sup> *Ibid.* p. 873.

occupation was recognized as a case of *force majeure*, that would not suffice to legitimate a long occupation.<sup>357</sup>

197. After the same insurrection the British agent and Consul-General at Tunis made a protest to the Bey on behalf of the British citizens who had suffered losses at Sfax, holding the French Government responsible for the losses on account of the insufficiency of the measures taken by the local authorities for the protection of persons and property. In a dispatch which the British Law Officers, Mr. James *et al.*, had commented upon in their opinion of 11 August 1881 as being right and proper, the British Secretary of State for Foreign Affairs stated the following to the Consul-General:

... Her Majesty's Government have always held the opinion that a foreign Power cannot, as a matter of international right, be made responsible generally for injuries inflicted on the persons or property of British subjects resident in the country by insurgents engaged in open and armed hostility to its Government, *which injuries the Government had not the power to prevent.*\* In such a case, foreigners cannot claim to be placed in a better situation than the natural-born subjects of the country. If a foreigner's property is injured by an invading army he has no title to compensation, and injury caused by insurgent rebels is subject to the same rule. If, indeed, the Government, having the power to do so, neglects or wilfully omits to restrain or put down the insurgents, it may be regarded as an accomplice in the act complained of, and there would be a right in the foreigner to demand compensation. It is possible that you may have reasonable ground for supposing that in the present instance the injuries complained of would not have occurred but for gross neglect on the part of the Bey's Government, although, so far as Her Majesty's Government are informed, this does not appear to have been the case. But, *under the circumstances,*\* it is desirable that protests of this nature should not be presented without previous communication with Her Majesty's Government, and I have accordingly to instruct you to refer home in the just instance if it should on any future occasion appear necessary to present a similar protest ...<sup>358</sup>

#### THE ALEXANDRIA INCIDENT, EGYPT (1882)

198. In 1882, an attempt was made in Alexandria by Arabi Pasha, first as a military officer and subsequently as a Minister of State, to subvert, with the assistance of certain military leaders, the constitutional Government. According to a letter dated 13 July 1882 of the British Foreign Office:

... Arabi Pasha, though warned that he would be held responsible, as a minister of State, for a breach of the public tranquillity consequent on his revolutionary proceedings and the inflammatory utterances of his party, altogether failed to take proper measures for the immediate suppression of the threatened outbreak and the protection of the lives and property of foreigners, though he had ample means at his command for doing so.

... the police force of Alexandria was not only an insufficient protection for foreigners under the circumstances, but, being animated by feelings of hatred to the foreigner, excited among them by the machinations of Arabi Pasha and his party, and having joined in the demand on the Khedive for the restoration of Arabi Pasha to power, refused to do their duty on the occasion of the outbreak, and made no attempt to protect foreigners against the violence of the mob.<sup>359</sup>

<sup>357</sup> *Ibid.*

<sup>358</sup> McNair, *op. cit.*, pp. 266-267.

<sup>359</sup> *Ibid.*, p. 267.

In an opinion (undated) of the British Law Officers, Messrs. James and Herschell, it is reported

that the general principle in cases like the one before us is that all States are bound to give reasonable protection to the persons and property of strangers resident within their territory, and are answerable to the parent State of those residents if that obligation be broken ...

The measure of the protection to be afforded is, in our opinion, that which a government, using all reasonable means, and exercising all reasonable diligence for the prevention and repression of outrage or violence to persons or property, is capable of affording.

If such means have been used and such diligence exercised, and, in spite of it, injury has been sustained by foreigners resident in a country, the government of that country could not, in our opinion, properly be called upon to make compensation. Whether the injury in any particular case is due to the government having failed to discharge its duties is a question of fact to be determined by the circumstance of that case.

We have not yet before us in a complete form all the facts relating to the outrages which occasioned the deaths of Mr. Richardson and Mr. Dobson; but, so far as we can judge, there was a failure to discharge the duties incumbent upon the Government of Egypt, which led to these disastrous consequences, and which would justify a claim for compensation.<sup>360</sup>

199. After order was restored, the Egyptian authorities proposed to entrust the settlement of claims of compensation for losses suffered by foreigners to an international commission to be constituted by a decree of the Khedive. The French Minister of Foreign Affairs, Mr. Duclerc, expressed his basic agreement on the proposed decree in a note dated 4 September 1882 addressed to the British Minister at Paris. However, Mr. Duclerc added the following comment on the terms of the proposed decree:

According to the terms of the draft decree attached to the controllers' memorandum, the damages that are to be compensated for are those arising from "the acts of war or rebellion, the acts of looting or burning that have occurred since 10 June 1882". Such damages resulting from situations of *force majeure* are considered by virtue of universally recognized precedents as creating no right to compensation on the part of the victims and no legal obligation on the part of the territorial sovereign. We have therefore every reason to believe, contrary to the opinion expressed in the memorandum, that the Egyptian courts would not hesitate, if claims against the State for acts of war or looting were before them, to refuse to hear the case and to declare themselves incompetent. We are nevertheless in agreement with the controllers in recognizing the disadvantages of involving the ordinary courts in the settlement of such matters, and we see nothing but advantage in settling the question of competence before the courts resume their sessions, in order to remove any grounds for uncertainty.<sup>361</sup>

#### RIOTS IN HAITI (1883)

200. On 14 December 1883, a representative of the *Chambre des Députés* of the French National Assembly reported upon the events causing losses to French residents in Haiti as follows:

... the riot was suppressed within a few minutes by the government troops, but the government troops themselves engaged in the most appalling disorders ever known in Haiti. The doors of the

<sup>360</sup> *Ibid.*, p. 268.

<sup>361</sup> Kiss, *op. cit.*, p. 624.

homes of Haitians and foreigners alike were broken down by gunfire ...<sup>362</sup>

In reply to that statement, the French Foreign Minister, Mr. Ferry, said:

It seems unfortunately to be all too likely that President Salomon must be held directly and particularly responsible for the abominable outrages of which we have just been told.

In any case, I should inform the Chamber that when the first news was received the Government did its duty: it transmitted the claims of our nationals to the Government of President Salomon, and I should say that without discussion or hesitation the Haitian Government unreservedly accepted the principle of these claims, the amount of which remains to be determined.<sup>363</sup>

#### REVOLUTION IN BRAZIL (1885)

201. On 11 March 1885, the Italian Government presented to the Brazilian Government claims for the losses which Italian residents had sustained during a revolution in Brazil. The Brazilian Government, however, repudiated responsibility for injuries resulting from acts of insurgents, and from what it called *vis major*. A counter-proposition of the Brazilian Government was rejected, but after negotiation, Italy and Brazil agreed to refer certain claims to a mixed local commission and submit certain other questions to arbitration by the President of the United States of America.<sup>364</sup>

#### THE ROCK SPRINGS RIOT, UNITED STATES OF AMERICA (1885)

202. On 30 November 1885, the Chinese Minister at Washington, Cheng Tsao Ju, brought to the notice of the United States Secretary of State, Mr. Bayard, the incident which occurred at Rock Springs in the territory of Wyoming on 2 September 1885, in which several hundred Chinese residents had been attacked by a lawless band of armed men, killing and wounding 28 Chinese and causing extensive losses to their property. The Chinese Minister emphasized the fact that the attack against the Chinese had been "unprovoked on their part" and that the civil authorities had made no attempt to prevent or suppress the riot. He therefore asked, in the name of his Government, *inter alia*, that the persons who were guilty be brought to punishment, and that the Chinese citizens be fully indemnified for all losses and injuries they had sustained.<sup>365</sup>

203. In his reply dated 18 February 1886, the Secretary of State of the United States described the scene of the incident at Rock Springs as an area remote from any centre of population and marked by

all the customary features of a newly and scantily settled locality. The population was made up of men of all races, migratory in their habit. To this remote and unprotected region, Chinese labourers voluntarily resorted in large numbers. Their assailants, also aliens, were discontented mining labourers who had unsuccessfully endeavoured to induce the Chinese to join them in a strike for higher wages. The incident was devoid of official character and of national character, since there was not on either side any representative of the Government of China or of the Territory of Wyoming. The Secretary of State went on to argue:

... Yet I am frank to say that the circumstances of the case now under consideration contain features which I am disposed to believe may induce the President to recommend to the Congress, not as under obligation of treaty or principle of international law, but solely from a sentiment of generosity and pity to an innocent and unfortunate body of men, subjects of a friendly Power, who, being peaceably employed within our jurisdiction, were so shockingly outraged; that *in view of the gross and shameful failure of the police authorities at Rock Springs, in Wyoming Territory, to keep the peace, or even to attempt to keep the peace, or to make proper efforts to uphold the law, or punish the criminals,\** or make compensation for the loss of property pillaged or destroyed, it may reasonably be a subject for the benevolent consideration of Congress whether, with the distinct understanding that no precedent is thereby created, or liability for want of proper enforcement of police jurisdiction in the Territories, they will not, *ex gratia*, grant pecuniary relief to the sufferers in the case now before us to the extent of the value of the property of which they were so outrageously deprived, to the grave discredit of republican institutions.<sup>366</sup>

#### INSURRECTION IN CUBA (1887)

204. An American citizen, Mr. D. G. Negrete, visited Cuba and bought an estate when that island was in a state of insurrection. Having thereafter sustained losses in his property through acts of insurgents, he requested his Government to present his claim to the Government of Spain. Rejecting the request for his Government's support for the Negrete claim, the Secretary of State of the United States of America, Mr. Bayard, explained its position in his letter dated 6 January 1888 as follows:

I now find that the Spanish Government denies its liability, and, aside from the technical bar of failure to lay the case in due time before the Commission, presents the important question of the conditions under which a government is liable to indemnify foreigners for losses arising from insurrections within its borders. The attention of this Department has been frequently turned to this question, which is to be determined by principles of international law applicable equally to cases in which the United States Government is the claimant for injuries thus suffered by its citizens, and to cases in which it is proceeded against by other Governments for similar injuries to foreigners within its borders. The principles which have been accepted by this Department, I now proceed to state.

The measure of diligence to be exercised by a government in the repression of disorder is not that of an insurer, but such as prudent governments are, under the circumstances of the case, accustomed to exercise. To adopt the rule as stated in the Code of Justinian, and as imported from the Code into all modern jurispru-

<sup>362</sup> *Ibid.*, p. 635.

<sup>363</sup> *Ibid.*

<sup>364</sup> J. Goebel, Jr., "The international responsibility of States for injuries sustained by aliens on account of mob violence, insurrections and civil wars", *American Journal of International Law* (New York), vol. 8, No. 4 (October 1914), pp. 847-848.

<sup>365</sup> Moore, *A Digest ... (op. cit.)*, vol. VI, pp. 822-823.

<sup>366</sup> *Ibid.*, pp. 834-835.

dence, and accepted, therefore, by Spain, as well as by the United States, the law requires "*diligentiam qualem diligens paterfamilias suis rebus adhibere solet*": remembering that "*paterfamilias*", in the sense in which it is here used, represents one whose relations to his family under the old law served to illustrate the relations of the government to the State. The decisive word in this rule is "*solet*". It appeals to *custom*. The maxim is, that the diligence good governments are *accustomed* to exercise under the circumstances must be exercised in each case; and every government is liable to foreign Powers for injuries to them or their subjects from lack of such customary diligence in the preservation of order.

What then is the custom which thus becomes the guide? Recently, in considering a claim against the United States not dissimilar to that you now ask to have pressed against Spain, I have had to show how custom depends on conditions; so that the degree of diligence customary and reasonable in a newly and sparsely settled region of country where the police force is weak and scattered, where armed forces cannot be maintained and where custom throws, on the individual, in a large degree, not merely the preservation of order but the vindication of supposed rights, is very different from the degree of diligence customary in a center of population under a well-organized police, and in which armed forces could be promptly summoned in support of the law. There are eras of revolt against which no government could protect itself except by maintaining a standing army which would not only be a menace to free institutions but would impose on the community burdens which in themselves might be the cause of revolts far more serious than those it was intended to prevent. Such a period marked the beginning of the late civil war in the United States, when this Government found itself without the means of immediately suppressing the insurrection in which the property and persons of foreigners, as well as of citizens were involved. When foreign governments complained of the injuries their subjects had thus sustained, they were informed "this insurrection is one of those calamities against which no prudent government could guard, except by measures more detrimental than the evil they are intended to remedy". And we further said, "It is the duty of foreigners to withdraw from such risks and if they do not, or if they voluntarily expose themselves to such risk, they must take the consequences". Such was the position taken by this Government during the late civil war; it was assumed by me, so far as concerns voluntary self-exposure by foreigners to the risks of an unsettled community, in my correspondence with the Chinese Minister at this capital in reference to the injuries inflicted on Chinese subjects in Wyoming and Washington Territories by mob violence. Mr. Fish, in his instructions to Mr. Foster of August 15, 1873, when discussing our claims against Mexico for injuries there sustained by American citizens from insurrectionary violence, said the rule sustaining such claims "should not always apply to persons domiciled in a country, and rarely to such as may visit a region notoriously in a state of civil war". It was on this ground that Mr. Seward on January 9, 1863, held that the United States Government was not liable for loss to Peruvian citizens caused by the destruction of their property on board a ship in the Chesapeake Bay in 1862, such destruction being caused by a sudden attack of insurgents which could not by customary and due diligence have been averted by the Government of the United States.

The standard of liability thus set up by the United States, in response to claims from abroad, it can not refuse to accept when claims are made by it on foreign States. The power of Spain promptly to repress insurrections in Cuba can not justly be assumed to be greater than that of the United States to repress the insurrection which culminated in the late civil war. The ability and duty of Spain to have at all times a military force at hand in Cuba so large as to enable it to protect property wheresoever attacked by insurgents, can not be assumed to be greater than that of the United States, in 1885, to have a military force stationed throughout its territories and on its western coast sufficient to protect Chinese laborers and miners at every remote point to which they might choose to resort. If the absence, from such scenes of unex-

pected disorder, of an adequate military force did not render the United States liable for injury to those foreigners, neither can the absence of an adequate military force, at the time of the destruction of Mr. Negrete's property in Cuba, of itself suffice to render Spain liable. The mere fact that an insurrection occurred is not proof of negligence, and indeed, the fact that an insurrection maintains itself for any considerable length of time is *prima facie* proof of *vis major* which throws upon the party alleging particular negligence the burden of proving it. Nor can the Department refuse to apply to citizens of the United States visiting foreign lands where insurrections for the time prevail, or the local government is powerless to suppress sudden tumults, the rule that it applied to foreigners who visited portions of our territory where insurrections for the time prevailed, or when the local government was without the power to repress sudden tumults. Spain cannot be held to a greater degree of liability to foreigners for losses incurred by reason of lawlessness in Cuba, than is the United States for similar disorders within its jurisdiction; nor can the United States claim for its citizens [residing] voluntarily in foreign lands, immunities which it will not concede when claimed against itself. We hold that foreigners who resort to localities which are the scenes of lawless disorder in this country do so at their own risk, and must apply the same rule to our own citizens in foreign lands.

It is a matter of notoriety that when Mr. Negrete visited Cuba, and there purchased an estate, that island was in a state of insurrection. I have no information as to the price he paid for the property nor from whom he bought it, nor the conditions of the sale; nor what influence the existence of the insurrection had upon the price. It is, however, notorious that estates in the district exposed to insurrection were from that cause and naturally greatly depreciated in value. So far as the information before me goes, Mr. Negrete voluntarily incurred the risks incidental to his purchase and naturally contemplated by him and all others who make investments in countries in an insurrectionary state and therefore has no right to call on this Government to demand from Spain indemnity for his losses so incurred.<sup>367</sup>

#### RIOT IN TURKEY (1890)

205. On 18 July 1890, the British Law Officers, Messrs. Webster and Clarke, approved a draft dispatch from the Marquis of Salisbury to Mr. Fane concerning a claim for indemnity demanded by a clerk of the British Consulate at Canea, Turkey, whose property had been destroyed while being guarded by Turkish soldiers, as well as another claim from the widow of the late Vice-Consul there, whose property had been burnt by Christians. After enumerating a series of "general principles" on which the British Government had "consistently acted in such cases", the draft dispatch said:

Her Majesty's Government would, however, in practice require the clearest proof of negligence on the part of the Government of a friendly State, or of culpability on the part of its authorities, before intervening on behalf of British subjects so long as they were accorded as favourable treatment as was extended to natives or to foreigners of other nationalities.<sup>368</sup>

#### MOB VIOLENCE AT NEW ORLEANS, UNITED STATES OF AMERICA (1891)

206. On 14 March 1891, 11 persons of Italian origin, who were charged with having been involved

<sup>367</sup> *Ibid.*, pp. 961-964.

<sup>368</sup> McNair, *op. cit.*, p. 269.

in the murder of the chief of police of New Orleans, were killed by a mob of citizens in a city prison. On the same day, the Italian Minister in Washington, Baron Fava, was instructed by the Foreign Minister, Marquis Rudini, to denounce the act of the mob and to request immediate and energetic measures for the protection of Italians in New Orleans and the punishment of the persons who were involved in the attack on the gaol. The Italian Minister brought the matter to the attention of the Secretary of State of the United States of America, Mr. Blaine, on 15 March. On 31 March 1891, the Italian Minister repeated his Government's demands, which consisted of an official assurance by the United States Government that the guilty parties would be brought to trial and the recognition, in principle, that an indemnity was due to the relatives of the victims.<sup>369</sup>

207. In a note dated 1 April 1891 to the Italian Chargé d'affaires, Marquis Imperiali (who took the office upon the departure of the Minister), the United States Secretary of State stated that, while his Government recognized the principle of indemnity to those Italian subjects "who may have been wronged by a violation of the rights secured to them under the treaty" [between the two States, guaranteeing to Italian subjects "the most constant protection and security"], and while it assured a thorough investigation of the incident, it declined to proceed in an unduly hurried manner to answer the Italian demands. In a further note dated 14 April, the Secretary of State stated:

If ... it should appear that ... the public officers charged with the duty of protecting life and property in that city connived at the work of the mob, or, upon proper notice or information of the threatened danger, failed to take any steps for the preservation of the public peace and afterwards to bring the guilty to trial, the President would, under such circumstances, feel that a case was established that should be submitted to the consideration of Congress with a view to the relief of the families of the Italian subjects who had lost their lives by lawless violence.<sup>370</sup>

208. On 12 April 1892, the Secretary of State paid a sum of \$24,330 to the Italian Government. In his note to the Italian Chargé d'affaires, he observed that, while the injury "was not inflicted directly by the United States, the President nevertheless feels that it is the solemn duty, as well as the great pleasure, of the national Government to pay a satisfactory indemnity".<sup>371</sup>

#### MOB VIOLENCE AT MARSOVAN, TURKEY (1893)

209. In his annual message to Congress of 4 December 1893, President Cleveland of the United States of America said:

The firing and partial destruction, by an unrestrained mob, of one of the school buildings of Anatolia College, established by citizens of the United States at Marsovan, and the apparent in-

difference of the Turkish Government to the outrage, notwithstanding the complicity of some of its officials, called for earnest remonstrance, which was followed by promises of reparation and punishment of the offenders.<sup>372</sup>

#### CIVIL WAR IN BRAZIL (1893-1894)

210. In a note dated 9 October 1893 to the Minister of the Navy, the Brazilian Minister of Justice wrote:

In times of domestic disturbance or civil war, the Government does not incur liability and does not violate the rights of individuals when, being compelled by *force majeure* and in the legal exercise of the public power, it ensures the safety of the State or commits acts causing injury to individuals. Whether nationals or aliens, the latter have no right to compensation. This is the doctrine that has prevailed in the view of the most authoritative quarters and in international practice.<sup>373</sup>

211. Commenting on the question of the responsibility of the Brazilian Government for the detention at Rio de Janeiro, during the civil war, of ships belonging to certain British shipowners, the British Law Officers, Messrs. Webster and Finlay, stated in an opinion dated 29 May 1896:

In our opinion, no such liability attaches to the Brazilian Government in respect of the detention of the ships at Rio as would justify Her Majesty's Government in presenting claims on behalf of the shipowners ... Foreigners must take the risks of civil war in any State to which they come, and the Government of that State cannot by international law be required to compensate them for injuries sustained by reason of civil war or insurrection. To sustain any such claim, it would be necessary to show that there has been on the part of the State some breach of duty under international law. The occurrence of an insurrection or the failure at once to put it down, does not constitute such breach of duty ...<sup>374</sup>

212. The same civil war caused certain damages to a number of Italian residents in Brazil. In a dispatch, dated 17 August 1894, to the Italian Minister in Brazil, Baron Blanc, the Italian Foreign Minister, wrote, *inter alia*:

The case of damages resulting from acts which were committed in violation of the law of nations by the authorities or agents of the Government against which claims are made is very different from the case of damages having other origins, such as those occasioned by ordinary operations of war or acts attributable to revolutionaries or malefactors under the ordinary law. In the case of the former, there is no doubt that the State should be held liable. In the case of the second, there is no rational basis for government liability, unless the Government or its agents manifestly failed to fulfil their duties with regard to *the possibility of preventing the damage complained of*.\* In so far as the third category, relating to the performance and interpretation of contracts with the local government entered into by subjects of the King, is concerned, it is proper to recognize that in the general interest of our colonies, whose success depends on their adapting themselves, as other more prosperous colonies do, to the laws, courts and customs of the country, it is inappropriate that Italians should count on the intervention of the Royal Government or its agents for the success of their commercial and industrial enterprises. Intervention is not

<sup>369</sup> Moore, *A Digest ... (op. cit.)*, vol. VI, pp. 837-838.

<sup>370</sup> *Ibid.*, p. 839.

<sup>371</sup> *Ibid.*, p. 840.

<sup>372</sup> *Ibid.*, p. 865.

<sup>373</sup> *Revue générale de droit international public* (Paris), vol. I (1894), p. 164. [Translation by the Secretariat.]

<sup>374</sup> McNair, *op. cit.*, p. 271.



justified in such matters, in the absence of a denial of justice, violation of treaties or breach of international law.<sup>375</sup>

213. A list of all the claims was submitted to the Brazilian Government on 11 March 1885 by the Chargé d'affaires of Italy. With regard to injuries caused to persons and properties by the acts of revolutionists, the Brazilian Government rejected all responsibility; the same being true also in the cases of *force majeure* resulting from incidents of war.<sup>376</sup> One of the claims, the *Camuyran Company* claim, became the object of correspondence between the two Governments. The company complained that in September 1893 the commander of the Brazilian federal forces "had put out of action two steam barges" belonging to the company. The Brazilian Government replied not only that the act "was justified by the necessity of preventing the rebels from using the vessels" but also that it was "an ordinary act of war, a case of *force majeure* giving rise to no right to compensation".<sup>377</sup>

#### RIOT AT NEW ORLEANS, UNITED STATES OF AMERICA (1895)

214. In March 1895, during a labour disturbance at New Orleans, Mr. James H. *Bain*, purser of the British steamship *Engineer*, was shot and wounded by a body of armed men without provocation or warning while he was discharging his duties on the wharves. It appeared that the rioters did not intend to shoot him, but that he was struck by a shot fired at labourers whom the rioters wished to prevent from working on the wharves. The British Ambassador, citing article 1 of the treaty of commerce of 1815 providing for the "most complete protection and security" of the merchants, argued that the British steamer had no protection from the armed mob by the local authorities. The Attorney-General of Louisiana denied that the State authorities were guilty of any neglect of duty or failure to protect the commerce of the city. In June 1896, the United States Government transmitted to the British Ambassador a payment "out of humane consideration and without reference to the question of liability therefor", as full indemnity to Mr. *Bain*.<sup>378</sup>

#### MOB VIOLENCE AT WALSBURG, UNITED STATES OF AMERICA (1895)

215. In March 1895, five Italian miners, suspected of the murder of an American saloon keeper, were attacked by groups of armed men while they were being escorted to a gaol and also when they were detained in the gaol. Three of the Italians were killed. Two fled into the mountains, but later had to

<sup>375</sup> *Revue générale de droit international public* (Paris), vol. IV, 1897, pp. 406-407. [Translation by the Secretariat.]

<sup>376</sup> *Ibid.*, p. 408.

<sup>377</sup> *Ibid.*, p. 407. [Translation by the Secretariat.]

<sup>378</sup> Moore, *A. Digest ... (op. cit.)*, vol. VI, pp. 849-850.

have their frost-bitten feet amputated. The Italian Ambassador, Baron Fava, in his representations to the Department of State of the United States, claimed that the circumstance that neither in the attack on the road nor in the breaking into the jail "did the public force make any resistance whatever", evidently fixed "the responsibility of the local authorities". The Italian Consul at Denver reported, however, that in his effort to secure the prosecution of the offenders he enjoyed the co-operation of the local authorities. But owing to various causes, among which were the sparseness of the population and the infrequency of terms of court, difficulties and delays occurred in the institution of proceedings.

216. In a message dated 3 February 1896 communicated to Congress, President Cleveland said:

Without discussing the question of the liability of the United States for these results, either by reason of treaty obligations or under the general rules of international law, I venture to urge upon the Congress the propriety of making from the public treasury prompt and reasonable pecuniary provision for those injured and for the families of those who were killed.<sup>379</sup>

217. A sum of \$10,000 was subsequently paid to the heirs of the murdered Italians and to the two who suffered injuries. In the letter dated 12 June 1896, transmitting the payment to the Italian Ambassador, the Secretary of State, Mr. Olney, said that the payment was made "out of humane consideration, and without reference to the question of liability therefor".<sup>380</sup>

#### RIOT AT HARPOOT, MARASH, ETC., TURKEY (1895)

218. In November 1895, it was reported that several buildings belonging to American missionaries were burned by Kurds and Turkish citizens, in the presence of Turkish soldiers during an Armenian riot. The United States Minister notified the Porte that the Turkish Government would be held responsible for the immediate and full satisfaction of all injuries. It was also reported that on 19 November an American missionary school at Marash was burned during an outbreak.<sup>381</sup>

<sup>379</sup> *Ibid.*, p. 843.

<sup>380</sup> *Ibid.*, p. 843. In 1897, a payment of the same nature, i.e., "out of humane consideration and without reference to the question of liability therefor", was paid to the families of three Italians who had been lynched while they were held in gaol on charges of homicide at Hanville, Louisiana. It was found, after investigations, that all the normal precautions for the safety of the prisoners had been taken by the local officers and that no blame could justly attach to them by reason of the sudden outbreak of mob violence (*ibid.*, pp. 843-845). Again, in 1898, the United States Government paid "out of humane consideration, without reference to the question of liability therefor", to the Mexican Government a sum of money "as full indemnity" to the heirs of a Mexican who had been lynched at Yreka, California, in 1895 (*ibid.*, p. 851). Similarly, another sum was appropriated by the Act of 3 March 1903, to be paid, "out of humane consideration, without reference to the question of liability therefor to the Italian Government, as full indemnity" to the heirs of the two Italians who were slain, and to another, who was injured, by an armed mob at Erwin, Mississippi, on 11 July 1901 (*ibid.*, pp. 848-849).

<sup>381</sup> *Ibid.*, p. 865.



219. In a note dated 14 February 1896 to the American Minister, the Turkish Foreign Minister, Mr. Pasha, maintained that in the disturbances at Harpoot and Marash the local authorities and imperial troops made every effort for the protection of the property and lives of Americans and that consequently Turkey was not obliged to indemnify them for their losses. He also argued that a government was not responsible for damage necessarily done in defending itself against an insurrection.<sup>382</sup> The United States Secretary of State, Mr. Olney, replied in his note dated 17 October 1896 that this doctrine of non-responsibility went much beyond "the very generally stated principle of international law that a government is not liable for damage to local interests of foreigners by the acts of uncontrollable insurgents", and "would appear to expand that doctrine to include irresponsibility for acts of the Government in repressing insurrection": and that, in either case, it wholly ignored "the responsibility of Turkey for spoliations and injuries committed by its authorities or agents themselves upon the persons and property of American citizens", of which spoliations and injuries there was declared to be abundant proof. The Turkish answer was therefore pronounced to be "entirely inadmissible".<sup>383</sup>

220. The Secretary of State further argued in his note dated 28 October 1896 to the United States Minister in Turkey:

That the premises of American citizens were inadequately guarded, fired upon by Turkish shot and shell, pillaged by Turkish soldiery, and left for hours to the unchecked ravages of fire, seems to be fully established, and in the face of such evidence the plea advanced in Mavroyeni Bey's note on behalf of the Ottoman Porte is utterly untenable, to say nothing of the almost conclusive proof of collusion between the garrison and the attacking Kurds. No room is discernible for the application of the limited and jealously qualified rule of international law relative to the irresponsibility of a government for the acts of uncontrollable insurgents. *The negligence of the authorities and the acts of their own agents are here in question, not the deeds of the Kurds, nor still less of the supposed Armenian rebels on whom the Porte seems to seek to throw the responsibility of these burnings and pillagings.*<sup>384</sup>

221. The Turkish Government took the same position of not admitting the principle of granting indemnities for claims "arising out of disorders which took place in certain localities of the Empire" in other incidents which became the subject of United States claims. The United States Secretary of State, Mr. Sherman, repeated his Government's position in his note dated 23 August 1897 to the American Minister in Turkey:

*A government being able to quell and not quelling such disorders,\* and damage to American property having resulted, the United States contends that Turkey can be held responsible under a well-recognized principle of international law.*<sup>385</sup>

Finally, in December 1898, the Sultan promised the American Minister to indemnify the losses. After a

long negotiation, on 12 June 1901, a settlement was reached when the Turkish Government made a payment for all valid outstanding claims of the United States, including those for the destruction of property at Harpoot and Marash.<sup>386</sup>

222. Considerable damage was also sustained by French residents and their property. In response to a note that the French Ambassador at Constantinople, Mr. Cambon, wrote on 22 April 1896, the Turkish Foreign Minister said in a note dated 20 June 1896:

... it is my duty to inform Your Excellency that the Sublime Porte, *by reason of the circumstances\** in which the disorders took place and the accepted rules in such matters, regrets that the principle cannot be accepted of granting indemnities for the case in question. Further, the strictest orders have been given to the competent authorities to prevent a repetition of such incidents.<sup>387</sup>

223. Replying to that argument, the French Ambassador wrote back on 27 June 1896 to the Foreign Minister:

To justify this refusal, you refer to *the circumstances in which the disorders that occasioned my démarche took place.*

I cannot accept such a rejection, having regard to the fact that *the circumstances*, far from authorizing the Ottoman Government to evade responsibility for the unhappy events that have taken place, are the cause and justification of my claims.

All the French nationals or French-protected persons on whose behalf I am formulating claims to indemnification to the Porte were victims of the *inexcusable negligence of the local authorities, civil or military, who were unable or unwilling to take the measures the circumstances demanded.\**

... *The responsibility of the Ottoman Government is thus incontestable by reason of the fault of its agents, and the circumstances surrounding the events,\** as a result of which French nationals and French-protected persons suffered damages in Anatolia, impose obligations on the Sublime Porte which I am confident considerations of equity will prevent it from evading;<sup>388</sup>

224. Later, in a note dated 28 January 1897 to the Turkish Foreign Minister, the French Ambassador repeated the circumstances which made the Turkish Government responsible for the losses, as follows:

I need not emphasize the obligation borne by the Imperial Government to compensate them and to indemnify the claimants for the losses they have suffered. For not only did the authorities have neither the foresight nor the energy to take measures to ensure the maintenance of order, but also, through an attitude that cannot be too severely condemned, they knowingly helped to extend and prolong the massacres and looting by delivering several quarters of the town to the armed Muslim populace. The police and the troops were indifferent and conniving witnesses to the looting of establishments belonging to French subjects, although a single word would have sufficed to halt the misdeeds of the armed bands.

In these circumstances, the Sublime Porte cannot evade the responsibility which is completely borne by the Imperial Government or the necessity of indemnifying the aliens the Porte refused to protect. There can be no discussion of the soundness of their claim.<sup>389</sup>

<sup>382</sup> *Ibid.*, p. 866.

<sup>383</sup> *Ibid.*

<sup>384</sup> *Ibid.*,

<sup>385</sup> *Ibid.*, p. 867.

<sup>386</sup> *Ibid.*, p. 868.

<sup>387</sup> Kiss. *op. cit.*, pp. 630-631. [Translation by the Secretariat.]

<sup>388</sup> *Ibid.*, p. 631. [Translation by the Secretariat.]

<sup>389</sup> *Ibid.* [Translation by the Secretariat.]

## CUBAN INSURRECTION (1895–1898)

225. In connexion with the losses which American citizens sustained in Cuba by acts of insurgents, the Acting Secretary of State of the United States of America, Mr. Uhl, wrote on 1 July 1895:

It is a generally accepted principle of international law that a sovereign government, is not ordinarily responsible to alien residents for injuries that they may receive within its territories from insurgents whose conduct it cannot control. Within the limits of usual effective control, law-abiding residents have a right to be protected in the ordinary affairs of life and intercourse, subject, of course, to military necessities, should their property be situated within the zone of active operations. The Spanish authorities are reported to be using strenuous endeavours to prevent the class of spoiliations which the writers apprehend, and notification of any particular apprehended danger from the insurgents would probably be followed by the adoption of special safeguards by the authorities. In the event, however, of injury, a claim would necessarily have to be founded upon averment and reasonable proof that the responsible officers of the Spanish Government, *being in a position to prevent such injury*,\* have failed to use due diligence to do so.<sup>390</sup>

226. In article VII of the Treaty of Peace concluded at Paris on 10 December 1898, Spain and the United States mutually relinquished all claims for indemnity of every kind of either Government or of its citizens against the other Government that might have arisen since the beginning of the Cuban insurrection. The article also anticipated that the United States would adjudicate and settle the claims of its citizens against Spain. Pursuant to that provision, an American commission was created by an Act of the United States Congress in 1901 to settle such claims. The Act provided that the claims should be adjudicated "according to the merits of the several cases, the principles of equity and of international law".<sup>391</sup> On 28 April 1903, the commission adopted several "principles" to be applied in its settlement of the claims, which read in part as follows:

2. Although the late insurrection in Cuba assumed great magnitude and lasted for more than three years, yet belligerent rights were never granted to the insurgents by Spain or the United States so as to create a state of war in the international sense which exempted the parent government from liability to foreigners for the acts of the insurgents.

3. But where an armed insurrection has gone beyond the control of the parent government, the general rule is that such a government is not responsible for damages done to foreigners by the insurgents.\*

4. This Commission will take judicial notice that the insurrection in Cuba, which resulted in intervention by the United States and in war between Spain and the United States, passed, from the first, *beyond the control of Spain*,\* and so continued until such intervention and war took place.

If, however, it be alleged and proved in any particular case before this Commission that the Spanish authorities by the exercise of due diligence might have prevented the damages done, Spain will be held liable in that case.

<sup>390</sup> Quoted by S. B. Crandall in "Principles of international law applied by the Spanish Treaty Claims Commission", *American Journal of International Law* (New York), vol. 4, No. 4 (October 1910), p. 810.

<sup>391</sup> *Ibid.*, p. 807.

5. As war between Spain and the insurgents existed in a material sense, although not a state of war in the international sense, Spain was entitled to adopt such war measures for the recovery of [its] authority as are sanctioned by the rules and usages of international warfare. If, however, it be alleged and proved in any particular case that the acts of the Spanish authorities or soldiers were contrary to such rules and usages, Spain will be held liable in that case.

8. Subject to the foregoing limitations and restrictions, it is undoubtedly the general rule of international law that concentration and devastation are legitimate war measures. To that rule aliens as well as subjects must submit and suffer *the fortunes of war*.\* The property of alien residents, like that of natives of the country, when "in the track of war", is subject to war's casualties, and whatever in front of the advancing forces either impedes them or might give them aid when appropriated or if left unmolested in their rear might afford aid and comfort to the enemy, may be taken or destroyed by the armies of either of the belligerents; and no liability whatever is understood to attach to the government of the country whose flag that army bears and whose battles it may be fighting.

If in any particular case before this Commission it is averred and proved that Spain has not fulfilled [its] obligations as above defined, [it] will be held liable in that case.<sup>392</sup>

## INSURRECTION IN FORMOSA (1897)

227. On 19 January 1897, in regard to an insurrection in Formosa, then a part of the Japanese Empire, the British Law Officers, Messrs. Webster and Finlay, reported:

The only ground upon which [Mr. Patel's claim] could be founded would be that the Japanese Government had been guilty of gross misconduct tending in a material way to bring about the insurrection ... No outside State has, under ordinary circumstances, a right to interfere in the regulation of the internal affairs of another State, and, unless the damage can be shown to have been occasioned by the direct act or neglect of the foreign Government or its agents, or by the neglect of the military police to afford protection which was afforded to the subjects of the country, no claim can be successfully maintained.<sup>393</sup>

## MOB VIOLENCE AT KOUANG-SI, CHINA (1897)

228. In April 1897, mob violence broke out at Kouang-Si, China, against French missionaries and businessmen. One of the missionaries was killed. On 20 April 1897, the French Minister at Peking, Mr. Gérard, lodged a protest against the Chinese Government, pointing out the gravity of the situation, the inaction of the governor of Kouang-Si, and the inadequacy of the troops of the province to control the mob.<sup>394</sup> On 21 April, according to the French Minister, the Governor of Kouang-Si was severely

<sup>392</sup> *Ibid.*, pp. 808–809.

<sup>393</sup> McNair, *op. cit.*, p. 271. Similarly, other Law Officers, Messrs. Reid and Lockwood, said on 13 June 1895 that "a claim for compensation may be supported ... wherever injury has been done to the subject of a foreign State by riot which could not have occurred but for the neglect of their duties by the local authorities" (*ibid.*, p. 270).

<sup>394</sup> Kiss, *op. cit.*, p. 632.

reprimanded by the Emperor, "recognized as guilty of negligence" and ordered to send a sufficient number of troops to suppress the mob.<sup>395</sup> Later, the French Consul at Long-Tcheou reported the arrest and execution of the mob leaders who had been responsible for the killing of the French missionary, as well as the payment of the compensation requested.<sup>396</sup>

#### INSURRECTION IN SIERRA LEONE (1899)

229. During a rebellion in Sierra Leone, British citizens and foreigners residing there suffered losses. In an opinion dated 17 August 1899, the British Law Officers, Webster and Finlay, denied any legal liability of the British Government to pay compensation for the losses. They said:

No government guarantees either its own subjects or the subjects of foreign States against the possibility of insurrection, and all residents in a State must take the chance of damage arising from such causes. In the case of foreigners, the claim might be put forward by their government, if it could be clearly established that the damage was the result of the neglect of some obvious and necessary precaution on the part of the government of the State in which the insurrection took place, or that the insurrection was caused by misconduct or neglect on the part of the government itself or its officials.\* Nothing of this kind has been suggested here ...<sup>397</sup>

#### DISTURBANCES IN RUSSIA (1906)

230. In connexion with the losses sustained by French citizens during the disturbances in Russia, the report made by the French commission in charge of examining the draft law relating to the determination of the general budget for the fiscal year 1907 (Ministry of Foreign Affairs) contained the following statements:

With regard to the losses suffered in the domestic disorders, it is known that a doctrine generally accepted in law *exonerates States from responsibility for damages which may result therefrom*.\*

In France, nevertheless, the Government, while maintaining the legal principle of its non-responsibility, has assisted the victims of public disturbances by payments awarded *ex gratia* and without distinction of nationality.<sup>398</sup>

#### DISTURBANCES AT CASABLANCA, MOROCCO (1906)

231. On 15 September 1906, the Chargé d'affaires of France at Tangier reported to the Acting Foreign Minister of France, Mr. Barthou, that violence had been caused at Casablanca by the servants of the Shereef Ma el Ainin while he was visiting that city. European residents there, and especially a French

smith-mechanic who took refuge in the French Consulate, were placed in danger. The Consuls of various States requested the Governor to take necessary measures for the protection of foreigners. The Shereef left the city the following day with his servants but no effort was made to arrest the guilty persons or to return the stolen objects to their owners. The Chargé d'affaires added that Ma el Ainin had been received by the Sultan on his return to Fez with great honour.<sup>399</sup>

232. In a communication dated 19 September 1906, the Acting Foreign Minister advised the French Chargé d'affaires as follows:

The Moroccan local authorities having neglected to take the necessary preventive measures to forestall the disturbances in Casablanca and having furthermore made no attempt to arrest the perpetrators and to make them return the stolen property, a request for compensation seems to be fully justified. Present a claim in this matter to the Makhzen and *point out that its responsibility results from the negligence and ill-will of its officials*.\* You might add orally that its responsibility in this case is aggravated by the encouragement it has just given in the form of gifts and subsidies to the principal organizer of the disorders.<sup>400</sup>

#### MOB VIOLENCE AT SOUTH OMAHA, UNITED STATES OF AMERICA (1909)

233. In a note dated 22 February 1909 to the Department of State of the United States, the Greek Legation in Washington referred to the riots against the Greek residents at South Omaha which had been occasioned by the murder of a police officer by a Greek prisoner. It was alleged that stores were broken into, property destroyed and personal injuries inflicted. The note stressed that the police protection afforded the victims of the attack was of an indifferent nature. The Minister thus requested that indemnities be paid to the victims.<sup>401</sup> In a communication dated 11 March addressed to the Department of State, the Governor of Nebraska denied any liability on the part of his State, arguing that:

At the time of this disturbance at South Omaha, the Governor tendered to the authorities of that municipality the services of the militia of the State, and did all within his power to prevent either personal violence or injury to property ...<sup>402</sup>

The United States Government, while denying "legal liability to pay indemnity in satisfaction of these claims", regretted the incident and announced that an appropriation of \$30,000 would be requested from the Congress.<sup>403</sup>

#### DISTURBANCES AT BARCELONA, SPAIN (1909)

234. Responding to a question posed by a representative in the French National Assembly concerning the claims of a certain number of French citizens

<sup>395</sup> *Ibid.*

<sup>396</sup> *Ibid.*, p. 633.

<sup>397</sup> McNair, *op. cit.*, p. 271. A similar argument based on the lack of "gross misconduct" or "neglect" on the part of the public authority during an insurrection was advanced by the same Law Officers in their opinion dated 19 January 1897 in connexion with the claim of Mr. Patel, who had sustained damage in Formosa (*ibid.* p. 271).

<sup>398</sup> Kiss, *op. cit.*, p. 618. [Translation by the Secretariat.]

<sup>399</sup> *Ibid.*, p. 634.

<sup>400</sup> *Ibid.*, pp. 634 and 635. [Translation by the Secretariat.]

<sup>401</sup> Hackworth, *op. cit.*, vol. V, p. 662.

<sup>402</sup> *Ibid.*

<sup>403</sup> *Ibid.*, p. 663.

who had sustained losses in the course of the disturbances at Barcelona in July 1909, the French Foreign Minister, Mr. Pichon, stated on 24 December 1909 as follows:

The difficulty is ... that there is no international jurisprudence in the matter of State responsibility when events occur in the context of civil or political disorders. The precedents thus vary from State to State; some States recognize their responsibility, others do not. In Spain, there is dual legislation: when aliens have complaints concerning acts attributable to rioters, the property of the latter is liable. But the legislation lays down that only the property of persons convicted of sedition is liable for the damage caused.

The insurgents were for the most part persons without means of support. It will therefore be very difficult to obtain compensation for acts falling within the framework I have just indicated.

Unfortunately, the acts giving rise to the most important claims are of this kind ...

With regard to the claims ... we cannot do more than request from the Spanish Government the compensation it is in a position to award under its legislation.

There are five claims, among them that of Mr. Raquillet; that claim relates to damage caused by troops ... There is also the amount we would have to claim for the family of one of our compatriots who was killed by the troops. In this connexion, Spanish legislation gives us the right to assert claims. A royal order of 3 June 1879 ... provides that damages caused by the *inevitable accidents of battle*\* are not subject to compensation, because it is not possible for the State to remedy all the evils caused by war, but that nevertheless compensation will be payable for damages caused in the execution of the orders of the military authorities or commanders or resulting from their prior dispositions ...<sup>404</sup>

#### ACTS OF REVOLUTIONISTS IN MEXICO (1911)

235. In connexion with American claims for losses caused by the acts of revolutionaries in Mexico, the Acting Secretary of State of the United States, Mr. Adee, wrote in his instructions dated 7 November 1911 to the American Ambassador to Mexico, Mr. Wilson:

... you should have also clearly in mind the principle which has been acted upon by our own Government, namely that, where an armed insurrection has gone *beyond the control of the parent government*,\* the general rule is that such government is not responsible for damages done to foreigners by the insurgents.<sup>405</sup>

#### INTERNAL TROUBLES IN EQUATORIAL AFRICA (1912)

236. The report made on 25 January 1912 before the French Senate by Senator P. Baudin in the name of the commission in charge of studying the draft law relating to the approval of the agreement of 4 November 1911 between France and Germany on the delimitation of their respective possessions in Equatorial Africa contained the following paragraph:

In the event of disturbances breaking out in a country, the local government cannot be held liable for damages suffered by aliens. It would appear that the State can incur liability only to the extent that it was established that it failed to show foresight or firmness and that it thus itself directly caused the injury suffered.<sup>406</sup>

<sup>404</sup> Kiss, *op. cit.*, p. 626. [Translation by the Secretariat.]

<sup>405</sup> Hackworth, *op. cit.*, vol. V, 1943, p. 668.

<sup>406</sup> Kiss, *op. cit.*, p. 618. [Translation by the Secretariat.]

#### MOB VIOLENCE AT SETÚBAL, PORTUGAL (1917)

237. In August 1917, a fish canning factory owned by a French national at Setúbal, Portugal, was sacked by a mob following a labour dispute. In a reply dated 28 February 1920 to a written question posed by a representative of the French National Assembly about the measures which the Government had taken, the French Minister for Foreign Affairs stated:

The Minister of the Republic in Lisbon has made representations on many occasions on behalf of the Beziens undertaking. The local court having acquitted, on the ground of the insufficiency of the evidence presented, the persons accused of committing acts of violence against the factories, the representative of the French Government has claimed indemnification, or more accurately compensation for the losses resulting from the destruction, from the Portuguese Government ... Despite the pressing and repeated *démarches* of the French Legation, the claim for compensation for the Beziens undertaking has not been accepted and the principle of indemnification has never been formally recognized by any of the Ministers of Foreign Affairs who have successively taken office in Portugal. From the beginning of the affair, all have, on the contrary, declared that the Government does not accept liability in cases of this kind. The French Chargé d'affaires in Lisbon has been requested to make renewed representations to secure satisfaction of the claim in respect of the Beziens undertaking.<sup>407</sup>

#### CIVIL DISTURBANCES IN PERU (1920s AND 1930s)

238. In December 1934, the Italian Legation requested the Ministry of Foreign Affairs of Peru to use its good offices to persuade the competent authorities to compensate the Italian subject Antonio Robello, resident in La Mejorada, for the losses which he had sustained during recent revolutionary disorders. It was established that Robello had been obliged to hand over to the rebels goods which, as it happened, were of little value. In the opinion of the Peruvian Ministry,

It is an ordinary judicial matter to investigate whether Travejo's act amounted to extortion, committed by an armed rebel, or whether it was a commercial transaction. But in neither case can the Peruvian State be held responsible. In the second case, it would obviously be a straightforward matter of private law.

On the other hand, if Travejo has committed an offence against Robello, Robello must charge him, so that the proper proceedings can be taken, and must claim the return of or compensation for that which was wrongly taken.

In accordance with the principles governing international responsibility and, in particular, the doctrine established by the Peruvian Government in the Circular of 26 October 1897, the State does not assume responsibility for damage and injuries sustained by foreigners as the inevitable consequence of rebellion or for damage and injuries inflicted by the rebels during the rebellion. Thus, even if it were judicially established that in this case extortion was committed during the rebellion, the Government could not be answerable for it.

This doctrine rests on the idea that the foreigner who establishes his domicile in a country voluntarily assumes the risk of any consequences that may befall him as a result of political and social disturbances that give rise to situations in which the legal authority

<sup>407</sup> *Ibid.*, p. 636. [Translation by the Secretariat.]

is unable to provide the protection it normally affords to the lives and interests of foreigners, as well as nationals.<sup>408</sup>

239. Soon afterwards, the Italian Legation, having been entrusted with responsibility for the interests of Hungarian subjects, supported the claim of the widow of Mr. Wittgruber for compensation for the death of her husband, who was killed in November 1930 in Malpaso in the clash which took place in connexion with the strike by the foundry workers of La Oroya. The Ministry of Foreign Affairs of Peru held the claim to be unfounded under the doctrine upheld by the Chancellery "as set forth in the circular of 28 October 1897, according to which the State is not responsible for damage caused by mobs during riots or insurrections, unless the authorities were culpable and patently negligent in their efforts to prevent it, assuming that this was possible". Furthermore, according to the Peruvian Ministry of Foreign Affairs, the record showed that "the authorities took the action which, in their opinion, the gravity and urgency of the situation required", thus indicating that it was a situation covered by the aforementioned reservation.<sup>409</sup>

240. During the same period, the German Legation at Lima made a diplomatic claim for compensation for a number of German firms in Iquitos for damage sustained as a result of the rebellion which had taken place in that region in 1921; the question of compensation had been under negotiation since 1922. In this case, the German Government had acknowledged that "according to the universal principles of international law, events such as those which have taken place in Iquitos do not entitle the victims of foreign nationality to receive compensation"; but it noted that the Peruvian Government, in other cases, had not observed the principles which it had established as early as 1897 and had paid compensation to German nationals and other foreigners following similar events. None the less, in a note of 4 March 1936, the Peruvian Ministry of Foreign Affairs maintained that the Government of Peru "has no connexion with the events on which the claimant firms base their position and consequently declines to accept any responsibility". It again referred to "the doctrine which the Government has invariably upheld when dealing with damage sustained by foreigners and nationals as a result of seditious movements which cannot be controlled by the authorities, even if they exercise all the powers at their disposal to maintain public order". And it added: "This doctrine is consistent with legal precedent, which is consonant with the principles of international law on the subject."<sup>410</sup>

241. In July 1936, the Spanish Legation at Lima upheld the claims filed by a number of Spanish citizens in connexion with the events which had taken place in Iquitos in 1921 and 1922. In reply, the

Peruvian Ministry of Foreign Affairs endorsed the 1897 doctrine, which "is borne out by legal precedent founded on the relevant principles of international law".<sup>411</sup>

242. In July 1936, the French Legation upheld the claims entered by French nationals in connexion with damage they had sustained in the popular disturbances of January 1931. In reply, the Peruvian Ministry of Foreign Affairs repeated that the Government held that "in accordance with the doctrine which it invariably has upheld, it is not answerable for the consequences of events which cannot be controlled by the authorities, even if they exercise all the powers at their disposal to maintain public order". And it added that, with regard to similar claims, the Government "has declined, as it does now, any responsibility on the ground that it has no connexion with the events to which such responsibility attaches, invoking in support of its position not only the foregoing facts but also the conclusions of the League of Nations Committee of Experts for the Progressive Codification of International Law".<sup>412</sup>

#### ACTS OF REVOLUTIONISTS AT OVIEDO, SPAIN (1934)

243. A subsidiary of the Singer Sewing Machine Company of New York sustained property damage by acts of revolutionists at Oviedo, Spain, and requested the United States Government to support its claim against the Spanish Government. In an instruction dated 9 January 1935 to the American Ambassador, the Department of State wrote:

In view of the well-established principle of international practice that a State is not responsible for injuries sustained by aliens at the hands of insurgents *unless there is a want of due diligence on the part of the Government in preventing the injuries*,\* the evidence submitted indicates no basis for the presentation of a formal diplomatic claim, even though the claimant company were American.<sup>413</sup>

#### SPANISH CIVIL WAR (1936-1939)

244. Regarding the alleged shattering of American property in Almería, Spain, cause by concussion from air bombardment, the Legal Adviser of the State Department of the United States wrote in a communication dated 7 June 1937:

... war damages which are caused in due course in the conduct of hostilities do not ordinarily form the basis for international reclamation.<sup>414</sup>

<sup>411</sup> *Ibid.*

<sup>412</sup> *Ibid.*

<sup>413</sup> Hackworth, *op. cit.*, vol. V, p. 670. Similarly, in a communication dated 29 September 1931 addressed to the American Ambassador to Cuba, Mr. Guggenheim, the Acting Secretary of State, Mr. Castle, wrote: "... the general position is that the responsibility of an established Government for the acts of insurgents is engaged when the constituted authorities, knowing of the imminence of the danger and being in a position to protect the property, fail to exercise due diligence for its protection" (*ibid.*).

<sup>414</sup> *Ibid.*, p. 684.

<sup>408</sup> Quoted by A. Ulloa in *Derecho Internacional Público*, 4th ed. (Madrid, Ediciones Iberoamericanas, 1957), vol. II, p. 261, foot-note 757. [Translation by the Secretariat.]

<sup>409</sup> *Ibid.*, pp. 261-262.

<sup>410</sup> *Ibid.*, p. 263, foot-note 757.

245. In a note dated 27 September 1938, the Legal Office of the French Foreign Ministry wrote:

It is ... generally accepted, in particular by the courts of arbitration that have had matters of this kind before them, that in the case of civil war a Government is not responsible for damages suffered by aliens at the hands of insurgents. *The situation would be different only if it were established that the regular Government had committed a fault or had not done everything within its power to avoid the damage or to check the revolution.*\*<sup>415</sup>

#### DISTURBANCES AT ALGIERS, ALGERIA (1964)

246. On 10 June 1964, during the operations of receiving postal parcels disembarked from a ship at Algiers, a violent explosion occurred, injuring three persons and causing considerable losses to parcels and letters. In a reply of 28 August 1965 to a written question in the French Assembly, the French Minister of Public Works and Transportation (Ministre des travaux publics et des transports) stated:

The Algerian postal administration decided, within the framework of article 33 of the international arrangement concerning postal packages, signed at Ottawa in 1957, that, by reason of its unforeseeable and irresistible character, this disaster, which occurred on its territory, constituted a case of *force majeure*. Under the terms of article 33 of the arrangement, postal administrations are exonerated from all liability when there is a case of *force majeure*. It follows that no compensation is payable by the Algerian postal administration for losses, spoilage or damage to postal packages resulting from the disaster in question. This decision, which is strictly in conformity with the international arrangement concerning postal packages, is binding on the French National Railways, which conveys postal packages on behalf of the Ministry of Posts and Telecommunications in execution of the agreement of 15 January 1892, as amended on 5 November 1945. The railway company has accordingly had no option but to reject claims for compensation submitted by the senders of destroyed postal packages.<sup>416</sup>

#### (i) International armed conflicts or hostilities

##### BOMBARDMENT OF GREY TOWN (1854)

247. In 1854, some British citizens sustained losses when a United States naval officer directed an attack against Grey Town (San Juan del Norte), Nicaragua, which had proclaimed itself to be an independent Government in 1852. Asked whether the British Government could bring claims against the United States of America, the British Law Officers, Messrs. Harding *et al.*, stated in their opinion dated 19 January 1855:

... The attack of the United States Government upon Grey Town may have been an act of unjust and cruel aggression; *but it is not the less an act of hostility between the Government of the United States, and that of Grey Town, to which the ordinary incidents of a state of public and international hostility must attach.*\*

This reasoning would, it is obvious, be inapplicable in a case where the attack was made colourably, and for the real purpose of doing an injury to the subjects of the third Power.

<sup>415</sup> Kiss, *op. cit.*, p. 637. [Translation by the Secretariat.]

<sup>416</sup> *Annuaire français de droit international*, 1965 (Paris), vol. XI, 1966, p. 1042. [Translation by the Secretariat.]

Our opinion is founded on the assumption of the contrary in the present case.<sup>417</sup>

#### CHILEAN-PERUVIAN WAR (1879-1884)

248. Various foreigners from Great Britain, France and Italy, suffered losses in consequence of the military operations of the Chilean forces during the war with Peru. At a court of arbitration set up at Valparaiso for the settlement of their claims, the Chilean agent contended, *inter alia*,

that pillage, fire, personal injuries, destruction of private property, were the inevitable incidents of all war, and that neutrals were bound to avoid them by removing from the locality where hostilities were taking place.<sup>418</sup>

249. The British Government was requested by the Italian Government to comment on the above Chilean argument. In an opinion dated 28 November 1884, the British Law Officers, Messrs. James *et al.*, made the following comment on the above passage:

No doubt fire, personal injury, destruction of private property, and possibly some pillage may be inevitable incidents of war. But they may also be wanton, excessive, and due to the war being carried on contrary to the usages of civilized warfare and the rules of international law.

It is evident, therefore, that the third principle, though in the main correct, cannot be accepted without qualification.<sup>419</sup>

#### FIRST WORLD WAR (1914-1918)

250. On 13 April 1915, a German aviator landed on the territory of the Netherlands, a neutral State, and was interned together with his aeroplane. The German Minister, in a note dated 20 May 1915, stated that the aviator had not been engaged in any military operation but had found himself crossing the border as a result of an error of direction in a training flight. He requested that the aviator and the aircraft be released. The Netherlands Minister of Foreign Affairs insisted, however, that the aviator and the aeroplane must remain interned, arguing that the great freedom of action of an aeroplane, the facility with which it reconnoitres and escapes all control, had necessitated special and severe treatment. He added that if an aeroplane was found above Netherlands territory it would immediately be fired upon, and if an aviator landed on its territory, whether of his own volition or in consequence of being fired upon, or for any other reason, he would be interned with his aeroplane.<sup>420</sup>

251. On 8 September 1915, two German Zeppelin airships crossed the frontier of the Netherlands, a neutral State, and, although signalled to land, continued their course. The Netherlands Government protested to the German Foreign Office, arguing that, although the airships might have arrived above Netherlands territory as a result of error in foggy

<sup>417</sup> McNair, *op. cit.*, p. 279.

<sup>418</sup> *Ibid.*, p. 285.

<sup>419</sup> *Ibid.*, p. 286.

<sup>420</sup> Hackworth, *op. cit.*, vol. VII (1943), pp. 550-551.

weather, their conduct after learning of their mistake did not seem justified. The German Government expressed regrets in a note dated 5 October 1915.<sup>421</sup>

252. In a note dated 17 February 1916, the German Government complained that armed forces of the Netherlands, without previous warning, had fired on a Zeppelin while it was flying over Netherlands territory on 1 February, when its actions should have shown that it was operating under *force majeure*. The airship was lost on the high seas as a result. The Netherlands Government replied that the airship had not indicated that it had suffered injury or wished to land and that it had previously been warned repeatedly that it was above neutral territory. It continued:

... It may be observed that the only effective means for commanders of German airships to avoid acts incompatible with respect for the sovereignty and neutrality of the Netherlands would be to keep themselves always far enough away from the maritime and land frontiers of the Netherlands to avoid the possibility of being brought above the territory of the Kingdom either by error or under the influence of atmospheric conditions.<sup>422</sup>

The German Government insisted that the airship had been in distress.<sup>423</sup>

253. In December 1916, distress signals were agreed upon between the Netherlands and German Governments. The German Minister stated on 27 December 1916 that in case one of its airships landed after displaying such distress signals, his Government would not object to the internment in the Netherlands, for the duration of the war, of the airship and its crew, after it had landed on Netherlands territory.<sup>424</sup>

254. In May 1917, a German aeroplane dropped bombs upon the Netherlands town of Zierikzee, killing three persons and causing extensive material damage. The Netherlands Government charged that the bombs were not launched by mistake but purposely. On 18 August 1917, another German air squadron flew over Netherlands territory and dropped a number of bombs. In reply to the protest made by the Netherlands, the German Government alleged again that the aviators had lost their way in the clouds, and it expressed regret at the occurrence. The explanation, however, was not considered satisfactory and the protest was renewed.<sup>425</sup>

255. On 17 October 1915, German aviators dropped eight bombs upon the Swiss town of La Chaux-de-Fonds, killing a child, wounding others and causing damage to property. On 31 March 1916, German aviators again dropped bombs on Porrentruy, near the French frontier, causing some damage to property. The Swiss Government, a neutral Government, addressed a protest to the German Government against those infractions of its sovereignty committed in violation of the assurances

which had been given earlier during the war that German aviators were instructed not to approach within three miles of the Swiss frontier. The German Government expressed its "deepest regret" for the bombardment of La Chaux-de-Fonds, stating that the aviators had been dismissed from the service. An indemnity also appeared to have been paid for the material damage, although in the case of the Porrentruy bombardment the German Government explained that the aviator had lost his way and believed that he was over Belfort.<sup>426</sup>

256. On 26 April 1917, a French aviator flew over and bombarded the Swiss town of Porrentruy, damaging several buildings and injuring three persons. It was claimed that the action had been taken in error. The French Government nevertheless promptly expressed its regret for the occurrence, offered a suitable indemnity and gave an assurance that the affair would be investigated and the aviator punished as soon as the facts were established.<sup>427</sup>

#### SECOND WORLD WAR (1939–1945)

257. On 9 March 1940, a Canadian army aircraft on a training flight made a forced landing, through mistake, in territory of the United States of America, then a neutral State, near the Canadian border. The United States Government decided to allow 24 hours for the plane and members of the crew to leave there after the Canadian Legation had been informed.<sup>428</sup>

258. On 21 December 1940, when Yugoslavia was a neutral State, the port of Susak near the Italian port of Fiume was bombarded by mistake by the British Royal Air Force. In November 1953, the British Government paid the Yugoslav Government a sum of £2,500 for the damage. It was said that Yugoslavia interpreted that measure as a symbolic reparation and a token of goodwill rather than as the recog-

<sup>426</sup> *Ibid.*, pp. 472 and 473.

<sup>427</sup> *Ibid.*, p. 473.

<sup>428</sup> Hackworth, *op. cit.*, vol. VII, pp. 556–557. The *general declaration of neutrality* adopted at Panama on 3 October 1939 provided that the American republics:

"(f) Shall regard as a contravention of their neutrality any flight by the military aircraft of a belligerent State over their own territory. With respect to non-military aircraft, they shall adopt the following measures: such aircraft shall fly only with the permission of the competent authority; all aircraft regardless of nationality, shall follow routes determined by the said authorities; their commanders or pilots shall declare the place of departure, the stops to be made and their destination; they shall be allowed to use radiotelegraphy only to determine their route and flying conditions, utilizing for this purpose the national language, without code, only the standard abbreviations being allowed; the competent authorities may require aircraft to carry a co-pilot or a radio operator for purposes of control. Belligerent military aircraft transported on board warships shall not leave these vessels while in the waters of the American republics; *belligerent military aircraft landing in the territory of an American republic shall be interned with their crews until the cessation of hostilities, except in cases in which the landing is made because of proven distress. There shall be exempted from the application of these rules cases in which there exist conventions to the contrary.*" (*Ibid.*, p. 556.)

<sup>421</sup> *Ibid.*, pp. 551–552.

<sup>422</sup> *Ibid.*, p. 552.

<sup>423</sup> *Ibid.*, p. 553.

<sup>424</sup> *Ibid.*

<sup>425</sup> J. W. Garner, *International Law and the World War* (London, Longmans Green, 1920), vol. I, p. 477.



dition of a positive obligation based on British responsibility.<sup>429</sup>

259. On 26 June 1944, during the air operations against Italy, bombers of the British Royal Air Force attacked, through error, part of San Marino, a neutral State, killing 59 persons (including 19 Italians), injuring 48 persons and causing property damage. In 1947, San Marino demanded reparations from the

<sup>429</sup> *Revue générale de droit international public* (Paris), 3rd series, vol. XXXII, No. 4 (October-December 1961), p. 384.

British Government, but the high amount of the claim resulted in the disruption of negotiations. After the negotiations were resumed, the British Government's offer of £81,000 was finally accepted by San Marino on 5 July 1961. The British Government made it clear that it did not assume any legal responsibility for the incident and that the reparation was proposed solely as "an act of grace and of friendship".<sup>430</sup>

<sup>430</sup> *Ibid.*, pp. 832-834.

## CHAPTER II

### International judicial decisions

260. The international judicial decisions recorded in this chapter are grouped in two main sections. Section 1 concerns cases of judicial settlement and section 2 deals with cases submitted to arbitration.

#### SECTION 1. JUDICIAL SETTLEMENT

261. The texts in this section relate to cases brought before the International Court of Justice or its predecessor, the Permanent Court of International Justice. Judicial decisions of international military tribunals relating to criminal proceedings against individuals—for example, decisions of the Nuremberg and Tokyo Tribunals constituted after the Second World War—have not been included, in view of the scope of the draft articles on State responsibility in course of preparation by the International Law Commission. Such an exclusion would appear justified by other considerations as well. The requirements for characterizing a given situation as a circumstance of "*force majeure*" or "fortuitous event" precluding wrongfulness in relations between States may not necessarily coincide with those set forth by criminal law, national or international, regarding criminal responsibility of individuals.

262. In the selection of the material on judicial settlement included in the present section, due account has been taken of relevant passages in judgements of the International Court of Justice and of the Permanent Court of International Justice and in separate or dissenting opinions of judges, and in pleadings by the agents of the parties before the Courts. The presentation of the material recorded follows the chronological order of cases.

#### CASE CONCERNING THE PAYMENT OF VARIOUS SERBIAN LOANS ISSUED IN FRANCE (*France v. Kingdom of the Serbs, Croats and Slovenes*) (1929)

263. This case involved a dispute which arose between the Serb-Croat-Slovene Government and the French holders of certain Serbian loans with regard to the question upon what monetary basis payment of the principal and interest of those loans should be effected. The French Republic, on behalf of the French bondholders, contended that the Kingdom of the Serbs, Croats and Slovenes was under an obligation to pay the amounts owed on the basis of the value of the gold franc, whereas the Kingdom of the Serbs, Croats and Slovenes contended that it was entitled to effect the service of its loans in paper francs.

264. In this case of 25 July 1928 submitted to the Permanent Court of International Justice, the Serb-Croat-Slovene State referred to "equity", "impossibility" and "*force majeure*". In raising these questions, reference was made to the grave economic crises and dislocations which occurred as a result of the First World War. Thus, it was said that Serbia, "continuously threatened by some conflict or other, has existed—without any fault whatsoever on its part—in a constant state of uneasiness and unrest".<sup>431</sup>

<sup>431</sup> *P.C.I.J.*, Series C, No. 16-III, pp. 461-462.



After recalling that the French Government itself was "led to stabilize its national currency, thereby imposing a definitive and irremediable sacrifice on its creditors ... and had justified its action by saying that it was impossible for it to cope otherwise with the enormous burdens resulting from the war",<sup>432</sup> the case stated:

... if the French Government, under the sway of evident *force majeure*, was forced to adopt this attitude towards lenders, it cannot equitably contend that the Serbian State, engulfed together with France by the very events that created this *force majeure*, cannot in its turn rely on the same plea, which is indeed recognized by the legislation of each of the two countries.<sup>433</sup>

265. In its counter-case of 24 September 1928, the French Government stated that the *compromis* signed at Paris between France and Serbia on 19 April 1928 provided for negotiations between both Governments one month after the decision of the Court and that those negotiations "have as their purpose the satisfaction of equity, once the question of law has been decided by the Court".<sup>434</sup> In his oral statement of 16 May 1929, the French agent, Mr. Basdevant, also developed the same point.<sup>435</sup>

266. The counsel of the Serb-Croat-Slovene State, Mr. Devèze, in the course of his oral statement before the Court of 22 May 1929, alluded again to "*force majeure*", "equity" and "impossibility" saying, *inter alia*, the following:

It is possible to conceive of equity without law when it is suggested that principles not recognized by positive law should be taken into consideration, but it is impossible to imagine law without equity. It can be said in general terms that if in an exceptional case the law is found to be divorced from equity, it is because the law has been ill understood or ill interpreted, for nowhere in the world is there a legislator who has wittingly intended to flout equity. There is one case in which this mingling of law and equity is most typically manifested: that is the case of *force majeure* which frees the debtor of his obligation by reason of the impossibility of his performing it, when this impossibility results from an unforeseen circumstance for which he is not responsible; the typical situation of *force majeure* being what the English call an act of God. Under all systems of law, war is the circumstance which most overwhelms the will of individuals.

We have been obliged to emphasize that equity should be examined because in all the pleadings of the French State the argument *pacta sunt servanda* has been levelled against us. Throughout the pleading, we have felt the thrust directed against the debtor who is in bad faith, the debtor who seeks to evade obligations fairly accepted, of which he is aware and which he wishes to evade. That is a moral position which the Serbo-Croat-Slovenian State cannot for one moment accept in this Court and which compels us to examine the point of view of equity.

... is it possible to imagine that the high international tribunal will not be led consider to in what conditions these loans were entered into, in other words whether the circumstances show that Serbia is seeking to obtain an unlawful gain or whether on the contrary it is governed by a force beyond its control, the *force majeure* of a war, in resisting a claim that the French Government itself would be unable to accept if an attempt were made to im-

pose a similar burden on it, and whether, this being so, Serbia's offer to service this loan in French francs does not satisfy every requirement the holders of the debt can legitimately expect of it?

The conditions in which Serbia contracted the loan are particularly significant.

But I turn now to an argument that in itself demonstrates the situation of *force majeure* resulting from the war: I refer to the attitude of the French Government with regard to its own loans.

Can France contend that it did this deliberately, by a sovereign act of its legislative power, that it acted freely, that it had not been compelled thereto by an irresistible imperative—it could honestly have reduced the value of its franc in order to pay its external creditors and even poor French citizens who had entrusted their petty savings to it? Surely not. ... No country in the world accuses France of this. Every country understands that France acted under the pressure of the consequences of the war and that in stabilizing its franc at one fifth of its former value it is acting towards all its creditors in the way the probity of a great nation requires in the present circumstances.

Will France say that it had an absolute right to reduce the value of its franc and that it was in no way bound in this regard vis-à-vis its creditors? No. There are questions of honour that a nation cannot ignore. If France acted as it did, it was because it was driven by the imperative of *force majeure*. By what right then do you challenge in our case the *force majeure* of which you yourselves were the victims?

France is of course one of the war's greatest victims. France can remind the world of its thousands of dead and of its devastated regions. But unhappy Serbia, which has suffered several invasions, which has fought three successive wars, which has been the victim of appalling devastation, which has freely shed its blood, which has lost all its youth and which is crushed by an unprecedented financial burden, has the right to compare itself, though it be a small country, with the great Power, France, of which it is the equal in morality and in law. And if France pays its foreign debts in depreciated French francs, may Serbia not in all equity plead *force majeure*, confident that the world, that is to say the International Court of Justice, will hear its plea?<sup>436</sup>

267. In his oral reply of 23 May 1929, the French agent, Mr. Basdevant, after commenting on certain figures, stated the following regarding the exception of *force majeure*:

... in the light of these figures and of this possible 5 per cent increase in the whole Serbian budget, I am bound to ask whether one can speak of the exception of *force majeure*. And since I question whether one can speak of the exception of *force majeure*, there is no need for me to remark that in speaking of the exception of *force majeure*, the representatives of the Serbian Government ceased to speak of French law. There is no need, either, for me to remark that, if there was indeed a situation of *force majeure*, Serbia should have invoked it also in the case of the English holders of the 1895 loan, who are still, unless I am badly misinformed, being paid in pounds sterling.

Finally, need I add that the Court is not required to consider *force majeure*, assuming it exists? That is reserved for another phase of the affair.<sup>437</sup>

268. In the *Judgement of 12 July 1929* concerning the case, the Permanent Court of International Justice stated with regard to the question of *force majeure*:

*Force majeure*—It cannot be maintained that the war itself, despite its grave economic consequences, affected the legal obli-

<sup>432</sup> *Ibid.*, p. 462.

<sup>433</sup> *Ibid.*, p. 470.

<sup>434</sup> *Ibid.*, p. 505.

<sup>435</sup> *Ibid.*, pp. 95–96.

<sup>436</sup> *Ibid.*, pp. 211–214.

<sup>437</sup> *Ibid.*, pp. 259 and 260.

gations of the contracts between the Serbian Government and the French bondholders. The economic dislocations caused by the war did not release the debtor State, although they may present equities which doubtless will receive appropriate consideration in the negotiations and—it resorted to—the arbitral determination for which article II of the Special Agreement provides.

It is contended that under the operation of the forced currency régime of France, pursuant to the law of August 5th, 1914, payment in gold francs, that is, in specie, became impossible. But if the loan contracts be deemed to refer to the gold franc as a standard of value, payments of the equivalent amount of francs, calculated on that basis, could still be made. Thus, when the Treaty of Versailles became effective, it might be said that “gold francs”, as stipulated in article 262, of the weight and fineness as defined by law on January 1st, 1914, were longer obtainable, and have not since been obtainable as gold coins *in specie*. But it could hardly be said that for this reason the obligation of the Treaty was discharged in this respect on the ground of impossibility of performance. That is the case of a treaty between States, and this is a case of loan contracts between a State and private persons or lenders. But, viewing the question, not as one of the source or basis of the original obligation, but as one of impossibility of performance, it appears to be quite as impossible to obtain “gold francs” of the sort stipulated in article 262 of the Treaty of Versailles as it is to obtain gold francs of the sort deemed to be required by the Serbian loan contracts.<sup>438</sup>

CASE CONCERNING THE PAYMENT IN GOLD OF THE  
BRAZILIAN FEDERAL LOANS CONTRACTED IN FRANCE  
(*France v. Brazil*) (1929)

269. This case arose as a result of a dispute between Brazil and the French holders of various Brazilian federal loans with regard to the question whether the service of those loans should be effected on the basis of the gold franc or of the paper franc. The French Republic, on behalf of its bond-holders, contended that the gold franc should be the basis of servicing the loans, whereas Brazil contended the paper franc should be the basis. The Brazilian Government, in its written and oral submissions to the Court, referred to “*force majeure*” and “impossibility” in connexion with French *municipal* law which allegedly prevented Brazil from making payment of the sums due to French bond-holders on the basis of the gold franc.<sup>439</sup>

270. In the French case of 29 June 1928, in a section entitled “Brazil having contracted in terms of gold must fulfil its obligations”, it was stated as follows:

Brazil undertook to service the three loans of 1909, 1910 and 1911 in gold. This undertaking must be executed; Brazil must pay, in currency that is legal tender at the place of payment, an amount corresponding in value to what it owes in gold.

<sup>438</sup> *P.C.I.J.*, Series A, Nos. 20/21 (Judgment No. 14), pp. 39–40.

<sup>439</sup> In the case involving Serbian loans referred to above, the Serb-Croat-Slovene Government contended that French municipal law, which it alleged was the law applicable, had the effect of rendering null and void the language of the bonds calling for payment in gold or at gold value. (For the Court’s discussion of this point in that case, see *P.C.I.J.*, Series A, Nos. 20/21 (Judgment No. 14), pp. 40–47). A similar argument was also presented by the Brazilian Government in the present case (*ibid.*, (Judgment No. 15), pp. 120–125).

There is no obstacle to such payment; in London and in Rio de Janeiro, the places of payment stipulated for the three loans, there is nothing to prevent Brazil from paying, for each franc promised, the equivalent in the currency of those places, at the prevailing rate of exchange of one twentieth part of a gold coin weighing 6 grammes 45161 of 9/10 fine gold.

In Paris, neither French law nor the decisions of French courts prohibit such payment. The two laws, one of which established the forced currency of Bank of France notes within the national territory, while the other prohibited dealings in national gold and silver currencies, have in no way impaired the principle of the gold clause inserted in contracts having an international character.<sup>440</sup>

271. In its case of 2 July 1928, the Brazilian Government stated:

When Brazil contracted these loans in 1909, 1910 and 1911, the régime applicable was that of the simple *legal currency*, the debtor being in a position to obtain from the Bank of France the *gold francs* he needed to settle his obligations.

As a result of the subsequent institution of the *forced currency régime* under which the *paper franc* continues to have the same status as legal tender for the payment of debts in currency, the debtor is in a situation in which it is impossible to obtain the gold francs needed for the service of the contracts from the issuing bank.

This change in the legal regulations governing French currency constitutes a case of *force majeure*, of the kind called in doctrine a sovereign act, hence the impossibility for the debtor of satisfying the obligation entered into under the strict terms of the contract.

...

What cannot be argued is that a simple stipulation that payment should be made in *gold francs*, made in the days of legal currency, when it was possible to obtain *gold francs* from the bank, should be intended to govern the settlement of the debt in the event (which the French courts then considered *unforeseeable*) of the forced currency régime being instituted and in fact of *gold francs* becoming *unobtainable*.

The Brazilian Government knew when it entered into the loans that under the legal currency rules for paper francs it could easily obtain the *gold francs* needed to service the contracts.

The possibility, which, if not unforeseeable, was at least unlikely, of the eventual introduction of the forced currency régime was not foreseen.

If, then, this event of *force majeure* has resulted in the impossibility of paying in *gold francs*, as had been agreed, the debtor may discharge his debt by paying in any other currency that is legal tender. This is the more true because what is claimed not that the Brazilian Government should pay in gold coins, which it cannot obtain, but rather in paper francs in amounts vastly larger than the amount due in *gold francs*.

...

The foregoing considerations lead to the following conclusions:

1. The obligations contracted by the Brazilian Government were entered into under the legal currency régime governing notes of the Bank of France.

2. The parties agreed to payment in *gold francs* at a time when it was possible to obtain such coins by the process of conversion which the Bank was required to undertake.

3. They did not foresee the possibility, which at that time seemed almost unrealizable, of the eventual institution of the forced exchange system.

4. The inconvertibility of the paper francs into gold francs, under the law of 1914, must be considered a case of *force majeure* (*fait de prince*), which has made payment in the agreed specie impossible.

5. Given the impossibility of obtaining gold francs, for reasons beyond its control, the debtor may settle the debt by paying, in

<sup>440</sup> *P.C.I.J.*, Series C, No. 16–IV, p. 186.

paper francs under the system of forced legal currency as many units as he owed in gold francs, the creditor not having the right to demand a greater number of francs than that shown in the certificates of indebtedness (Civil Code, article 1895).<sup>441</sup>

272. In its counter-case of 1 October 1928, the French Government commented further on the question of *force majeure* as follows:

A. *The law on the mandatory exchange of Bank of France notes does not constitute a case of force majeure*

It should be noted first that a circumstance that does not prevent the performance of an obligation but merely renders its performance more difficult or more burdensome does not constitute a case of *force majeure*. This is true of the law providing for the forced currency of banknotes of the Bank of France. The Brazilian Government can of course no longer obtain from the Bank of France the old French gold coins which were in circulation before 1914 and were abolished by the law of 25 June 1928. But that does not prevent it from obtaining anywhere in the world the amount of gold that it needs to service its loans. Still less does this prevent it, in the absence of gold, from paying its creditors the equivalent value of this gold, on the date of payment, in the currency of the place where the payment is effected. The gold payment clause in fact generally results in payment in the currency of the place of payment calculated in terms of gold.

...  
It is evident that the gold payment stipulation has produced its protective effect when the debtor has paid the creditor the exact equivalent value of the gold he owed in the currency of the place of payment. Such was the finding of the Court of Cassation of France in three decisions given on 23 January 1924.

...  
Such is the universally accepted doctrine, and the Court of Cassation has, let it be said once more, thrice affirmed it. There is consequently nothing to prevent Brazil either from obtaining the gold or, more simply, from placing in the hands of its creditors the equivalent value of this gold in the currency of the place of payment at the rate on the day when the payment is effected. The latter solution is that adopted in all the international conventions providing for payments to be made in gold francs.<sup>442</sup>

273. In a *Judgment of 12 July 1929*, the Permanent Court of International Justice stated the following with regard to the question of *force majeure*:

*Force majeure*. — The economic dislocation caused by the Great War has not, in legal principle, released the Brazilian Government from its obligations. As for gold payments, there is no impossibility because of inability to obtain gold coins, if the promise be regarded as one for the payment of gold value. The equivalent in gold value is obtainable.<sup>443</sup>

<sup>441</sup> *Ibid.*, pp. 153, 155, 156 and 158. [Translation by the Secretariat.] The Brazilian counter-case of 30 September 1928 further stated:

"The possibility was not foreseen of a future law providing for forced currency under which it would not be feasible to convert bank notes into gold coins; the debtor did not assume the risks of this measure of *force majeure*, resulting exclusively from an act of the public power in France, inspired solely by the French public interest." (*Ibid.*, p. 240.)

<sup>442</sup> *Ibid.*, pp. 255–257. In his oral statement of 28 May 1928, the French counsel, Mr. Montel, said:

"Let us first take the French forced currency law: this does not involve a case of *force majeure*. A circumstance which does not prevent the performance of an obligation but simply makes its performance more difficult or more burdensome does not constitute a case of *force majeure*." (*Ibid.*, p. 109.)

<sup>443</sup> *P.C.I.J.*, Series A, Nos. 20/21 (Judgment No. 15), p. 120.

THE SOCIÉTÉ COMMERCIALE DE BELGIQUE  
CASE (*Belgium v. Greece*) (1939)

274. This case arose as a result of the non-execution by Greece of two arbitral awards made in 1936 in favour of a Belgian company, the Société commerciale de Belgique. Greece, according to the awards, was obliged to make certain payments to the company. In its application and memorial to the Permanent Court of International Justice, the Belgian Government asked the Court, *inter alia*, to declare that the Greek Government, by refusing to carry out the arbitral awards, had violated its international obligations. The Greek Government, in its submissions, disputed the allegation that it had refused to carry out the award, and *inter alia*, requested the Court to dismiss the claim of the Belgian Government concerning the violation by Greece of its international obligations, and to declare that Greece had been prevented by *force majeure* from carrying out the arbitral awards. In the course of the proceedings, the representatives of the two Governments dealt at length with the question of *force majeure*. Questions were posed in that regard by Judges of the Court. The discussions concerning the *force majeure* question are reproduced below in considerable detail, as they represent one of the more exhaustive treatments given to the question before the Court. This case also reflects certain doctrinal positions concerning the distinction between *force majeure* and "state of emergency" (*état de nécessité*).

275. In the light of the acknowledgement by the Greek Government that the two arbitral awards had the force of *res judicata*, the Belgian Government modified its submissions, with the result that the allegation that Greece had violated its international obligations disappeared. In its *Judgment of 15 June 1939*,<sup>444</sup> the Court noted that this also rendered invalid the Greek submission that the allegation be dismissed and that Greece had been prevented by *force majeure* from executing the awards. The Court did, however, deal with a further Greek submission that, while acknowledging that the awards had the force of *res judicata*, by reason of its budgetary and monetary situation it was materially impossible for the Greek Government to execute the awards as formulated. The somewhat complicated nature of the proceedings, involving modifications or withdrawals of submissions, also calls for a detailed presentation of the case.

276. As indicated above, the question of *force majeure* was first raised by the Greek Government. Its counter-memorial of 14 September 1938 read, in part, as follows:

... it is wholly untrue that the Hellenic Government has refused to execute the arbitral award; at no time has it thought of challenging the validity of the award or of refusing to execute it. On the contrary, the Government respects *res judicata* and the high authority that attaches to the personality of the arbitrators.

It has already executed the clauses that it was incumbent on it to execute; it has delivered the letter of guarantee and promulgated the law providing for the substitution of the Hellenic State

<sup>444</sup> See para. 288 below.

for the company in the relations of the latter with its sub-contractors.

It has even initiated the execution of the principal provision by declaring its readiness to pay a sum equivalent to \$300,000, which, however small in itself, is none the less proof of its determination to perform its obligations within the limits of its financial possibilities.

Nevertheless, the country's financial situation, as it was established by the survey conducted by the League of Nations, is unchanged; everything that the representatives of the Financial Committee recorded in 1933 regarding the capacity of Greece remains valid today. Accordingly, the immediate and full payment in cash, as the company and the plaintiff request, of a sum of 6,771,868 gold dollars or 1,270,000,000 drachmas or, with interest to 1 August 1938, 1,400,000,000 drachmas, is absolutely impossible.

The immediate and full payment of such a sum in fact exceeds the financial capacity of the country, which is a country of limited resources; this amount constitutes a substantial proportion of the annual budget of Greece, and it is totally impossible to charge so large an amount to the budget without irremediably jeopardizing the normal operation of the country's public services.

Moreover, the payment of this sum implies the transfer of foreign currency in an amount such, in comparison with the gold cover that assures the stability of the national currency, as undoubtedly to imperil the stability of the currency.

Finally, the undertakings given by Greece with regard to holders of external debt obligations preclude it from treating its debt to the company more favourably than its external debt, lest the whole system of arrangements concluded with its creditors collapse.

There is no question therefore of refusal or of fault, as the Belgian Government appears to believe; no fault can be imputed to Greece in this matter; a pressing necessity, beyond its control, a case of *force majeure*, has obliged the Hellenic Government, anxious to carry out the award, to propose that the company should accept a payment on account and conclude a provisional arrangement analogous to that accepted by the other creditors pending definitive arrangements for the settlement of the country's external debt.

There is no justification for contending that Greece has refused to execute the award, when, instead of refusing, it declares itself, wholly prepared to execute the award by making a payment on account and concluding an arrangement consistent with its financial situation and the special circumstances in which it is placed.

However, the company has been unwilling to look at the facts of the situation and to demonstrate the good will essential for the practical execution of the award ... it is therefore through the fault of the company and of the plaintiff that the execution of the arbitral award has thus far been impossible.

It is a matter of principle that the sacrosanct character of acquired rights and of *res judicata* must bow to the exigencies of the general interest and of the State's primary obligation to assure the regular operation of its public services, and the normal fulfilment of the functions which it exercises and which are inherent in its mission.

The State has in consequence the duty to suspend the execution of *res judicata* if its execution may disturb order and social peace, of which it is the responsible guardians or if the normal operation of its public services may be jeopardized or gravely hampered thereby.

The Government of Greece, anxious for the vital interests of the Hellenic people and for the administration, economic life, health situation and security, both internal and external, of the country, could not take any other course of action; any Government in its place would do the same.

The company for its part cannot argue that it is unable to accept the offers of the Hellenic Government out of respect for *res judicata*; ...

On the contrary after the award was made there arose a question of fact, a question different from that resolved by arbitration: the question whether the financial capacity of the Hellenic Government permits it or not to make full and immediate payment of the sum owed as fixed by the Commission.

The Hellenic Government does not seek to impose on the company the basis it proposes for the settlement of the debt; it simply makes a proposal with a view to obtaining the assent of the company for the practical purpose of executing the award as far as is possible; the company should accept this proposal, having regard to the special circumstances in which Greece is placed; the company was not therefore justified in relying on the authority of *res judicata* to reject the Government's proposal.

The Hellenic Government has not refused to execute the award; it is not at fault; it has not flouted the acquired rights of the Belgian company; it has not violated international obligations and it has not committed a wrongful act contrary to the law of nations, as the plaintiff alleges; the first request in the plaintiff's conclusions is therefore ill-founded and should be set aside.<sup>445</sup>

277. In its reply of 29 October 1938 the Belgian Government replied to the question of the "obstacles which, according to the Hellenic Government's counter-memorial, prevent the execution of the arbitral award" and in particular to the issue of "the budgetary and transfer possibilities, in other words the country's economic and financial situation"<sup>446</sup> as follows:

If the Hellenic Government considered itself to be in a position, after the arbitral award was made and notwithstanding the special character of its debt to the company, to promise the holders of its external debt that they would be treated as the most favoured creditor; this fact cannot be invoked against the company; even if this is in practice an obstacle to the payments due to the company, the obstacle is one the Hellenic Government itself created.

2. To describe the country's economic and financial situation, the Counter-Memorial recalls a passage from the report of the Financial Committee of the League of Nations of 30 June 1933, which sets out the circumstances in which partial insolvency had become inevitable for Greece in 1932.

It should be noted that in submitting this report to the League of Nations on 12 October 1933, the Financial Committee expressed the following opinion:

It would seem, however, that in the course of recent months Greece has participated to some extent in the general improvement in the world situation.

The Belgian Government does not consider that the Court's deliberations include discussion of Greece's capacity to pay, but it ventures none the less to note certain facts which invalidate the conclusions of the Hellenic Government's Counter-Memorial ...<sup>447</sup>

278. The rejoinder of 15 December 1938 submitted by the Greek Government included the following:

The arbitral award, rendered between the Government and the company, is without force so far as the holders of the external debt are concerned, the latter not having been parties; and if the Government conforms to the award, it runs the risk that the bondholders will make use of the clause that prohibits favourable treatment of another loan; the argument that the debt to the company does not arise from a loan, the position taken by the arbitral Commission, may not be given consideration in subsequent proceedings between the Government and the bondholders; this is an important point that was neither examined nor resolved by the arbitral award and that the Court cannot take into account.

<sup>445</sup> *P.C.I.J.*, Series C, No. 87, pp. 99-102.

<sup>446</sup> *Ibid.*, p. 111.

<sup>447</sup> *Ibid.*, pp. 111 and 112.

Thus the Government finds itself unable to treat the company's debt more favourably, under pain of being obliged to extend this treatment to the great mass of its creditors; this would bring about the collapse of the arrangements painfully worked out with the creditors, the depreciation of the national currency, and the disruption of the budget and the country's economic situation generally.

...

Finally it is not correct, as the Belgian Government's other submission alleges, that any obstacle to the payments due to the company that may arise from the agreement in question was created by the Government, which cannot invoke it against the company.

The Hellenic Government did not agree of its own volition to insert this clause in the agreements; it was obliged to do so; the bondholders presented this clause as a *sine qua non* of the arrangement concerning Greece's external debt, and there is no doubt that they will insist on its adoption in the arrangement at present under discussion; the Hellenic Government has therefore the right to plead, in relation to the company and the Belgian Government, the impossibility which confronts it by reason of the clause in question.

...

Clearly, there can be no question, of embarking in this Court on a discussion of the extent of Greece's capacity to pay; on this point, we are in agreement with the Belgian Government (see its rejoinder, p. 112); however, in order to demonstrate the lack of substance of its principal conclusion, which would have the Court declare that Greece has violated its international obligations, it will be necessary to describe in general terms the country's budgetary and monetary situation.

...

In these circumstances, it is evident that it is impossible for the Hellenic Government, without jeopardizing the country's economic existence and the normal operation of public services, to make the payments and effect the transfer of currency that would be entailed by the full execution of the award or even the implementation of the proposal made and subsequently withdrawn by the company.

...

... our earlier statement that everything the representatives of the Financial Committee reported in 1933 on Greece's financial capacity was still valid today was no exaggeration; the Committee reported that in 1932 Greece was unable to effect the payments due on the greater part of its external debt. That finding is still valid today.

It follows from all that has been said that the Hellenic Government has not refused to execute the terms of the arbitral award which fixed the amount of its debt; it has been unable to do so, because it is bound by the agreements concluded with the bondholders of its external public debt and because it has been, and still is, affected by a situation of *force majeure*, namely inescapable financial and monetary necessities; all the plaintiff's requests are therefore without foundation and should be rejected.<sup>448</sup>

279. The agent for the Belgian Government, Mr. Muûls, in his oral submission made on 15 May 1939, stated:

It is true that in its rejoinder submitted to the Court the Hellenic Government affirms on the contrary that it has not refused to execute the provisions of the arbitral award which fixed the amount of its debt. But it has, it added, been unable to do so, because it is bound by agreements concluded with the bondholders of the Greek external debt.

We shall have no difficulty in disposing of this contention; moreover, in law the Hellenic Government cannot, in order not to execute the obligations of an arbitral award, rely on undertakings freely given by it subsequently to third parties.

<sup>448</sup> *Ibid.*, pp. 139–142.

In order to establish the impossibility of paying the debt, the Hellenic Government in the second place pleads "*force majeure*, namely inescapable financial and monetary necessities".

The Belgian Government will refrain from discussing here Greece's capacity to pay; it has no thought of asking the Court to engage in an examination of problems involving an assessment of a country's economic situation.

But the Belgian Government refuses on the other hand to accept that it can be the prerogative of the Hellenic Government to decide unilaterally, as it pleases and arbitrarily, the extent to which it will perform its obligations; this would be tantamount to reducing to a nullity the undertaking resulting for it from the award.<sup>449</sup>

280. On the same day, the counsel for the Belgian Government, Mr. Levy Morelle, made the following further comments:

...

In fact the question of Greece's capacity to pay was raised earlier before the arbitrators; what answer did they give in their award of 3 January 1936? That assuming that the Hellenic Government's financial failure could be regarded as being the result of a case of *force majeure*, article 6 of the agreement stipulates "that no prejudicial, consequence of events of *force majeure* may be borne by the company; that *force majeure* cannot therefore be argued against the company in order to release the Hellenic Government from the legal consequences of the suspension beginning on 1 July 1932 ... (annexes to the Belgian Memorial, p. 38).

Thus, on this issue also, the debate is closed: we are dealing with an argument that has been submitted, resubmitted, examined from every angle and refuted by a sovereign and final judicial decision.

The Société commerciale de Belgique, when preparing to invest substantial capital in Greece, took care to stipulate in the agreement of 1925 that no prejudicial consequence of events of *force majeure* should be borne by it; this clause is assuredly legitimate; the burden of *force majeure* may be shifted; in our case, the parties have freely so decided and stipulated.

Thus, when at the beginning of 1936 the Hellenic Government produced before the arbitrators the argument it submits to you today, the award provided the answer: "Under article 6 of the agreement you assumed the consequences of *force majeure*".

Consequently, whether one looks at the matter from the point of view of good faith—when, obviously, questions of capacity to pay can never excuse a total failure to execute—or from the juridical standpoint of *res judicata*, the Hellenic Government has assumed the risks of *force majeure*. In both cases, the question has been submitted to the arbitral tribunal.<sup>450</sup>

281. The counsel for the Greek Government, Mr. Youpis, presented orally in considerable detail, on 16 and 17 May 1939, that Government's views on the application of the exception of *force majeure* to the case:

The Hellenic Government has not challenged and does not challenge the authority of the arbitral award. It has not refused and does not refuse to execute the award. What has prevented and prevents the Hellenic Government from executing the award immediately and fully is its budgetary situation and its inability to transfer currency abroad. For these reasons, it is impossible for the Hellenic Government to execute the award without delay and in full; they constitute a case of *force majeure* which exonerates the Government from all responsibility. But we will take up this issue later ...

Moreover, it should not be overlooked that there are three distinct reasons for which the Hellenic Government claims that it is

<sup>449</sup> *Ibid.*, p. 167.

<sup>450</sup> *Ibid.*, pp. 180 and 181.

not in a position to pay its debt in full: first, the state of its finances does not permit it to do so; second, there is its inability to make transfers; and third, its agreements with other creditors.

... the Hellenic Government has sought to the best of its ability to reconcile its intention to execute the award with the legitimate desire not to incur, by acting otherwise, the rigorous sanctions of the London agreements, which would entail the collapse of the external public debt arrangements, with the consequential ruin of its finances and national economy.

In order to make clear the reasons that compelled the Hellenic Government to take the position already described with regard to the execution of the award, it is necessary to outline the circumstances in which it was obliged to suspend the service of its external public debt in 1932, as well as the agreements with its creditors.

Greece is a country with limited resources. The League of Nations mission which was sent to Greece in May 1933 to study the country's economic and financial situation, which I shall discuss later, made a report that can be summarized as follows:

... Thus, according to the Financial Committee, Greece's partial insolvency had become inevitable, under the influence of economic factors that cannot be attributed to it; it was impossible for Greece, for reasons beyond its control, to service its external debt in full and to maintain the stability of its currency.

In short, the League of Nations recognized that in acting thus Greece was in full good faith and that its attitude was the unavoidable result of a case of *force majeure*.

... The fact that it was impossible for Greece to satisfy the claims of its creditors in full was not only established by the League of Nations after a thorough inquiry on the spot; the creditors themselves and the Chairman of the League of Nations Loans Committee, whose distinguished reputation is unanimously acknowledged, were convinced of it and solemnly placed this impossibility on record ...

... It will be realized that, in the opinion of the creditors, the country's economic improvement has not achieved the level asserted by the Belgian Government.

The creditors thought the improvement had been slight; that is why their demands were rather modest.

It will be shown later how the views of the company and the Belgian Government differ in this matter from those of the great majority of Greece's creditors.

The Hellenic Government maintains that the country's budgetary and monetary situations does not permit its to execute in full the provisions of the award which fixed the amount of its debt to the Belgian company, as the Belgian Government asks; it argues that it was and is financially impossible for it to do so; in short, it pleads a situation of *force majeure*.

The plea of *force majeure* was not made for the first time by the Hellenic Government in its rejoinder. Throughout the negotiations, it continually invoked it, in order to obtain the company's assent to an acceptable and possible *modus vivendi*.

It was with some surprise that I heard Mr. Levy Morelle cite article 6 of the agreement of 27 August 1925 between the Hellenic Government and the Société commerciale de Belgique as a ground for ruling out the exception of *force majeure* put forward by the Hellenic Government.

The Hellenic Government, he says, cannot rely on a situation of *force majeure* preventing it from paying the debt fixed by the arbitrators because article 6 provides that prejudicial consequences of *force majeure* may not be borne by the company.

... On reading the the article it is clear that the article is not germane to our case; article 6 has a single purpose: to provide for the

repercussions of *force majeure* on the material and technical progress of the work.

The article twice makes it clear that the cases of *force majeure* in question are those likely to have a direct or indirect repercussion on the progress of the work.

In our case, we are not concerned with the technical advancement of the work; work that is to be paid for is already completed; the issue here is whether the owner of the product must pay the debt resulting from the work executed, as well as the supplies delivered, as fixed by the arbitrators, or whether on the contrary he is exonerated from all responsibility by reason of the fact that he has been compelled by a situation of *force majeure* not to perform his obligations.

The two issues are separate, and what was stipulated in regard to the progress of the work during the period of construction cannot be applied to the settlement of sums due in respect of the work already executed.

... The award examined—that was it was concerned with—the influence of the situation of *force majeure* that arose in 1932 on the possibility of cancelling the contract; in our case, we are concerned with an examination of the effect of the situation of *force majeure* that occurred in 1936, after the award was made, on the possibility of paying the debt fully or not.

The subjects are different, and the award does not decide our question; this is the more true because the impossibility in question did not arise until after the award was made.

I cannot agree that the arbitral commission decided the question of the effect of *force majeure* on the payment of the debt fixed by the award. Even if that were not the case, I cannot, despite my deep respect for the distinguished members of the commission, agree that the award correctly interpreted and applied article 6. And I beg the Court to give the question its full attention and to examine itself the article, in order to elucidate its true significance.

... with regard to *force majeure*, I should like to put forward some considerations with regard to doctrine and international precedents, particularly in so far as *force majeure* and the pecuniary obligations of States are concerned.

It is a principle that contractual commitments and judicial decisions must be executed in good faith. The principle does not apply to individuals alone; it is also applicable in general to Governments.

Nevertheless, there occur from time to time external circumstances beyond all human control which make it impossible for Governments to discharge their duty to creditors and their duty to the people; the country's resources are insufficient to perform both duties at once. It is impossible to pay the debt in full and at the same time to provide the people with a fitting administration and to guarantee the conditions essential for its moral, social and economic development. The painful problem arises of making a choice between the two duties; one must give way to the other in some measure: which?

Doctrine and the decisions of the courts have therefore had occasion to concern themselves with the question; they have had to examine the applicability of *force majeure* in public international law in general and more particularly the question of the failure of States to meet the claims of their creditors, where this failure results from a situation of *force majeure*.

Doctrine recognizes in this matter that the duty of a Government to ensure the proper functioning of its essential public services outweighs that of paying its debts. No State is required to execute, or to execute in full, its pecuniary obligation if this jeopardizes the functioning of its public services and has the effect of disorganizing the administration of the country. In the case in which payment of its debt endangers economic life or jeopardizes the administration, the Government is, in the opinion of authors, authorized to suspend or even to reduce the service of debt.

Professor Gaston Jèze, who has particularly explored this subject, has expressed this idea on several occasions. Thus, in a course at the Carnegie Institute in 1927-1928, he said: The debtor State, even when it is declared the debtor, must conserve its resources, despite condemnation, in order to ensure the functioning of its essential public services. This is a point that considerably diminishes the rights of creditors in relation to States.

In the *Journal des finances* of 2 August 1927, he develops the same idea: it is, he says, an undoubted rule of international financial law that a State is authorized and entitled to suspend the service of its public debt to the extent that full Service of the debt would jeopardize the proper functioning of its essential public services. It is evident that a Government is not going to halt its national defence, police and judicial services in order to pay its creditors in full.

The same writer adds, in the *Revue de science et de législation financière* (Oct.-Dec. 1929, p. 764):

"It is a rule of positive international law that a State is entitled to place the functioning of its essential public services ahead of the payment of its debt."

More recently, in 1935, in a series of lectures at the Académie de droit international (*Recueil*, vol. 53, p. 391) he returned to the same subject:

"At the same time, a theory has emerged which is very just in principle but which has had unexpected ramifications and has served as a pretext for State failures to pay: a Government is justified in suspending or reducing the service of its public debt whenever essential public services would be jeopardized or neglected in order to ensure the service of the debt.

"In other words, the public debts is not the first public debt to be satisfied. These principles are unchallengeable and unchallenged."

Professors de La Pradelle and Politis, commenting in the *Recueil des arbitrages internationaux* (vol. II, p. 547) on two arbitral awards given on 1 and 8 October 1869 between Great Britain and Venezuela, wrote:

"It does not follow from the fact that a debt is certain and unchallenged that the debtor must settle it in full; it is necessary also that the state of his finances should permit him to do so. However tempted one may be to disregard the special characteristics of a public loan and to place it on the same footing as ordinary obligations, a State which cannot pay its debts cannot be treated more rigorously than bankrupt or financially embarrassed individuals."

In this connexion, a further question arises: who is competent to decide, first, whether the proper functioning of the public services will be endangered by payment of the debt, and second, where savings are to be made and which taxes will be introduced. Doctrine and the practice of States recognize that the debtor State alone has the right to decide these two questions.

In his series of lectures in 1935, Professor Jèze said:

"This principle has been supplemented by the following propositions:

"1. The Government of the debtor State is alone competent to say whether essential public services would be jeopardized by the service of the debt.

"2. The Government of the debtor country is alone qualified to select the public services on which savings must be made, the revenues to be established or the Customs policy to be followed."

In its controversy with Great Britain on the settlement of inter-allied debts, France invoked the same principle in its note of 17 January 1931, which stated:

"The proposed arbitration would have the effect of making an arbitrator responsible for judging the financial policy of France and, if necessary, introducing modifications for reasons of equity. But the determination both of the financial policy of a State, when that policy is not challenged in law, and of the

measures of equity which it may be appropriate to take in regard to that policy, are within the exclusive jurisdiction of the State in question."

The question of *force majeure* in relations between two States and of the failure of a State to satisfy its creditors received particular attention from the Permanent Court of Arbitration in its award of 11 November 1912 in the well-known dispute between Russia and Turkey.<sup>451</sup>

...

The Court, having stated the principle that "all damages are always reparation or compensation for a fault", made the following statement with regard to the exception of *force majeure* put forward by the Ottoman Government:

"The exception of *force majeure* invoked in the first place may be raised in public international law, as well as in private law; international law must adapt itself to political exigencies."

In another preambular paragraph, the Court added:

"However slight the degree to which the (financial) obligation imperils the existence of the State, it would constitute a case of *force majeure* which could be invoked in public international law, as well as by a private debtor."

It is significant that even the plaintiff, the Government of Russia, was in agreement with regard to the principle. The award states: "The Imperial Russian Government expressly admits that a State's obligation to execute treaties may be diminished if the very existence of the State is endangered, if compliance with the international duty is ... self-destructive ..."

...

But to what extent can the financial difficulties of a State in complying or in fully complying constitute a case of *force majeure* exonerating the Government from all responsibility?

The Court of Arbitration stated the following principle: a situation of *force majeure* exists whenever payment of the debt may imperil the existence of the State, even if the peril is not great, or the payment may gravely jeopardize the internal or external situation.

The award of the Court of Arbitration has been generally approved in doctrine. In his course of lectures at the Académie de Droit international in 1935, Professor Jèze endorsed it in the following terms:

"I shall merely note the guiding principle affirmed by these jurists—he was referring to the doctrinal note by Mr. de La Pradelle and Mr. Politis on the case between Venezuela and Great Britain—and expressed by the Permanent Court of Arbitration in its award of 11 November 1912."

"This principle (Mr. Jèze continued) flows from a genuine necessity: caught between service of the debt and national defence, for example, rulers may be obliged to suspend the former [service of the debt] in order to ensure the functioning of the latter."

Professor Alfred von Verdross, for his part, in his study, *Völkerrecht*, 1937 edition, is in agreement with Professor Jèze and endorses the theory adopted by the Court of Arbitration. Here in English translation is what he wrote on this subject on page 189:

"This category includes in the first place the principle that international duties must not be taken so far as to result in self-destruction. This principle of self-preservation has been expressed in the award of The Hague Court of Arbitration of 11 November 1912 on the Russo-Turkish dispute."

The application of the principle of *force majeure* depends of course on the particular circumstances of each case; in the Russo-Turkish case, the Court was unable to accept the exception of *force majeure* invoked by the Ottoman Government; it considered that the sum due was too small—only 6 million francs—for its payment to imperil the existence of the Ottoman Empire or to jeopardize its situation.

<sup>451</sup> See paras. 388-394 below.



It is therefore certain that the Court, in conformity with the principle it stated, would have accepted the exception of *force majeure* and would have exonerated the debtor State from all responsibility if payment of the sum due would, by reason of the amount involved, have imperilled the existence of the debtor State or gravely jeopardized its internal or external situation.

In addition to doctrine and the judicial decisions mentioned, there is the Conference for the Codification of International Law convened in 1929 by the League of Nations. As you know, this Conference was concerned with, among other subjects, the question of State responsibility and more particularly with the repudiation by States of their debts.

...

According to the bases of discussion prepared [by the Preparatory Committee for the Conference] which reflect the common ground among the opinions expressed by the Governments questioned, a State may not in principle suspend or modify the service of its debt wholly or in part.

There is, however, an exception to the rule: the State does not incur responsibility if it has suspended or modified the service of the debt under the pressure of financial necessities.

This is the theory of *force majeure* expressed in another formulation, and it is well known that various schools and writers express the same idea in the term "state of emergency".

Although the terminology differs, everyone agrees on the significance and scope of the theory; everyone considers that the debtor State does not incur responsibility if it is in such a situation.

Before going further, the Hellenic Government draws attention to its budgetary difficulties; it contends that the amount owed to the Belgian company constitutes a substantial proportion of its annual budget.

Thus, the settlement of the debt was and is bound seriously to impair the balance of the budget, the functioning of the country's essential public services and its economic and social structure.

...

In the light of the foregoing, it can be concluded that the company's claim was so substantial in relation to the Greek budget that its full and immediate settlement or even the immediate payment of 4 million gold dollars was practically impossible.

It was necessary for the Government, compelled by a situation of *force majeure*, to propose to the company a limited provisional settlement commensurate with its possibilities.

...

The Hellenic Government argues in the second place that its capacity to transfer currency did not and does not permit it to make so large a payment to the head office of the company in Belgium; its situation from this point of view creates, it maintains, greater difficulties with regard to the full execution of the award, or even its execution over a period of time as proposed by the company, than does the state of the country's finances.

...

... In short, the policy followed by the Government in this matter is simple. The people must live on what the country produces; needs must be restricted to what is strictly necessary and only what is absolutely essential must be imported from abroad. Even so, for these absolutely essential imports, a sufficient quantity of foreign currency must be available. And if a massive transfer was made, as the Belgian company requested, the amount remaining in the reserves of the Bank of Greece would be so small that not only would the stability of the currency be endangered but the satisfaction of the most elementary needs of the population would be affected.

It must therefore be recognized that if the Hellenic Government had yielded to the demands made, or even to the company's compromise proposals, it would have betrayed its mission, which consists in ensuring the well-being of the people and maintaining if not improving a proper standard of living for the people.

...

The possibility must be considered that if the dispute between the Hellenic Government and its creditors is brought before a court, the court's decision will be on the lines I have indicated. If this be so, the Government faces a grave danger in complying with the arbitral award regarding the company. It runs the risk of being obliged to apply similar arrangements for payment in the case of the other loans.

The risk is so large and so substantial that the Government cannot afford to take it. There is no question of a slight danger; the very existence of the State is at stake.<sup>452</sup>

282. In the course of the statement referred to in the preceding paragraph, Judge Hudson put to the counsel for the Greek Government the question of the purpose for which the exception of *force majeure* was invoked in the case, and added: "Is it for the purpose of showing that Greece is relieved of any obligation to the Société commerciale de Belgique which may have been determined to exist by the arbitral decision of 1936?" Replying to that question, the counsel for the Greek Government stated:

The Belgian Government has instituted proceedings which amount to this; the Belgian Government says to the Hellenic Government: "You have violated your international undertakings and the principles of the law of nations because you deliberately refuse to execute the arbitral award and you are thereby intentionally impairing the acquired rights of the Belgian company."

To this accusation, the Hellenic Government replies: "No, we have not deliberately violated our international undertakings, as you maintain; we have been obliged by fortuitous events, by a situation of *force majeure*, not to execute the award fully as you requested; but we are ready to come to an agreement with you and to find a practical solution, with a view to paying to the extent we are able to do so and to discharging our obligations to the company. We propose a solution; this solution has been accepted by the great mass of the State's creditors; it has been accepted by the American company Ulen; it is the only solution consistent with the facts of the situation and the country's capacity to pay. We do not want to be relieved of all obligations towards the company; we respect these obligations; but we can only perform them to the best of our ability, and we have proposed a logical, practical and equitable solution" ...<sup>453</sup>

283. The counsel for the Greek Government then concluded his statement by saying, *inter alia*:

Having come to the end of my statement, let me summarize:

The Belgian Government has formally based its case on the intentional fault of the Hellenic Government; but it has not been able to furnish proof of this fault; the fact that the award has not so far been executed does not constitute sufficient proof; the juridical consequence of this fact is that the case should be dismissed outright.

The Hellenic Government is not required to prove its allegations, since the plaintiff has not proved his.

However, it has demonstrated the truth of all that it has argued; to this effect, it produced in the first place the findings of the League of Nations; in its report, after an enquiry on the spot, the League of Nations established that it was impossible for the Hellenic Government to service its external debt in 1932 and 1933, that this impossibility resulted from a situation of *force majeure* which exonerates the Government from responsibility and that no fault can therefore be attributed to the Government.

It also produced the agreements in which its creditors recognize the good faith of the Government; in successive agreements, the

<sup>452</sup> P.C.I.J., Series C, No. 87, pp. 190, 191, 193-195, 197, 198, 200-202, 204-209, 211, 212, 217, 218 and 220.

<sup>453</sup> *Ibid.* pp. 222 and 223.



creditors recognize that the impossibility of the Government's complying in full continues to this day.

This recognition of the impossibility affecting the debtor emerges not only from the substance of the agreements, which provide for a substantial relief of the burden on the debtor, but in addition is stated in an explicit and formal declaration embodied in the agreement of August 1936.

It should be mentioned that this explicit declaration is subsequent to the arbitral award.

The finding of the League of Nations with regard to the good faith of the debtor is binding on the Belgian Government, not only because Belgium is a member of the League but also because it was represented in the Financial Committee; the Belgian Government cannot reject this finding.

Further, the recognition by the other creditors of the impossibility of the Hellenic Government's complying in full has considerable weight.

...

What does the Belgian Government produce to counter this evidence? An affirmation that the economic situation in Greece has recently improved; an affirmation based on a few official statements and a few communications that are political in character.

The statements produced are fragmentary; they do not deal with the country's economic, financial and monetary situation as a whole or explain the reasons for developments or the factors involved; they refer only to matters favourable to the argument that there has been an improvement.

We have tried to illuminate this subject thoroughly; we have examined every aspect of the problem; what the examination shows is that the improvement is partial and small and that it is offset in part by other, unfavourable factors.

In any event, it in no way demonstrates the possibility of full and immediate execution of the award or of full execution over a period of times such as the company proposes.

The budget could not withstand so substantial a burden, and the reserves of the central bank could not be so greatly reduced. To act otherwise would provoke financial, monetary, economic and social disaster.

There remains the undertaking given by the Hellenic Government to its other creditors; more favourable treatment of the claims of the Belgian company would result in the collapse of the arrangements established in the public debt agreements.

The disaster would be even deeper; the unsustainable burden arising from the execution of the award would be augmented by the much heavier burden of the full, or almost full, service of the external debt.

...

The Hellenic Government is not the only Government to have suffered from such difficulties; a great many countries have felt the pressure of post-war circumstances and similarly have found it impossible fully to perform their obligations. They have found means of one sort or another to relieve the heavy burdens upon them; devaluation of the currency and the more or less free conversion of public loans have been among the means most frequently employed.

...<sup>454</sup>

284. The counsel for the Belgian Government, Mr. Sand, replied orally on 17 May 1939. At the close of his statement, he indicated the *modified* submissions of the Belgian Government, stating *inter alia*:

... today, in the final conclusions that have just been read, the Hellenic Government asks that it be noted that it recognizes *res judicata*, but not without reservations; it recognizes it subject to the

explicit reservation that it is impossible for the Government to execute the award as it was given.

If we examine this conclusion in the light of the arguments that have been expounded by Mr. Youpis, we find that the impossibility which the Hellenic Government states prevents it from executing the award involves three elements: first, Greece's financial situation, second, the difficulty of transferring currency to Belgium—these are factual impossibilities—and third, a juridical obstacle, the impossibility resulting, according to the Hellenic Government, from the existence of the London agreements with the bondholders of the Greek foreign debt. These agreements were presented earlier, during the discussions with the company and later with the Belgian Government, as something that might be imposed on the Société commerciale de Belgique, but in the course of Mr. Youpis's submission were mentioned only as a possible basis for conversations with a view to the execution of the award.

To consider the first aspect of these contentions, and disregarding the final conclusion we have just heard, it would seem that in the mind of the Hellenic Government the only remaining difficulties in the way of executing the award were factual and not legal. Accordingly, if there were no further legal difficulties and legal objections, there was no longer a violation of an acquired right and there was no longer a breach of international law.

In a learned survey of the question of *force majeure* in relation to State obligations, Mr. Youpis stated yesterday that a State is not obliged to pay its debt if in order to pay it it would have to jeopardize its essential public services.

So far as the principle is concerned, the Belgian Government would no doubt be in agreement. But in applying the principle, before any consideration of the capacity to pay of the State concerned, it is necessary to determine whether the non-execution is indeed solely dictated by factual considerations deriving from incapacity to pay or whether there are not also, in support of the non-execution, other reasons derived from an alleged right or the challenging of a right.

This is what is expressed, in an admirably succinct formulation, in the fourth question (to which Mr. Youpis referred yesterday) examined at the Conference for the Codification of International Law: "Without repudiating its debt, the State suspends it."

What must be ascertained, in order to decide whether there was and still is a violation of international law, is not whether the Hellenic Government is now capable of paying in full or in part, but whether the Hellenic Government repudiates or has repudiated its debt or whether it does no more or has done no more than suspend it.

In the first case, if it repudiates or has repudiated its debt, there will be a legal dispute within the competence of this high Court. In the second case, there will merely be an absence of payment, a purely factual non-execution, which, in the event of a claim, might eventually be the subject of proceedings in an international tribunal called upon to consider whether the alleged incapacity to pay exists and in what measure.

...

Incapacity to pay can entail only a full or partial suspension of payment, which may moreover be modified and terminated; but it will not entail release from the debt, even in part.

Let us avoid the confusion that would consist in extending the notion of incapacity to pay to include objections of a juridical character, such as those relating to payment in gold dollars or the assimilation of the company's claim to the external debt of Greece; here, we would be on ground other than that of incapacity to pay.

The money difficulty, assuming it were established in the case of the Hellenic Government, would not imply a reduction of the debt or a modification of the arrangements for payment envisaged in the award; incapacity to pay will not affect the amount of the debt or the currency in which payment is paid; it will only affect the time or times at which payment may be made.

<sup>454</sup> *Ibid.*, pp. 231–233.

In order to justify the absence of any payment of principal or interest, incapacity to pay would have to be pushed to a point at which even payments over a period of time, the effecting of payments on account or the payment of interest would imperil the public services, economy or finances of the State.

Let us bear in mind the case between Russia and Turkey to which Mr Youpis referred yesterday, in which the Court held that a payment of six million francs was too small to imperil the existence of the debtor State or jeopardize its internal or external situation.

But in the present proceedings, let us bear in mind also that, since 25 July 1936, the date of the final award, the Hellenic Government has not found the means of making the smallest payment of principal or even of interest to the company, thus demonstrating at the very least a complete absence of good will.

...

You will recall that article 6 of the 1926 agreement contains a formal provision declaring that all event of *force majeure* are at the expense of the Government.

Mr. Youpis has told you that this provision did not refer to payments and that it appeared in a chapter entitled "Mode of execution of work".

You have in your hands a copy of the 1925 agreement. If in the course of your deliberations you glance at the layout of the first articles, you will note that it is inaccurate to say that there is a chapter entitled "Mode of execution of work" or that article 6 appears under such a heading ...

...

This is something the arbitral commission already decided, not in connexion with the present case, but in connexion with another argument that had been raised before it, namely the question of the cancellation of the agreement.

After 1 July 1932, the Hellenic Government ceased to pay the company interest or to repay principal. The company asked that the agreement should be cancelled because of the stoppage of payments. The Hellenic Government replied:

"We were unable to pay because there was a financial crisis such that we were confronted by a situation of *force majeure*."

The company countered by saying:

"Under article 6, it was you who assumed liability for situations of *force majeure*."

This is what the arbitrators said in their award, and they did so in the most general terms (annexes to the Belgian memorial, p. 38):

"Considering, it is true, that the Government pleads Greece's financial deficit, which, according to it, constitutes a case of *force majeure* obliging it to suspend the execution of its financial undertakings; that it relies on the findings ...

"... that, assuming that the financial failure of the Hellenic Government can be regarded as the result of a case of *force majeure*, article 6 of the agreement stipulates that the company shall not be liable for any prejudicial consequences of events of *force majeure* ..."

You see, gentlemen, that in the specific case in which the interpretation application of article 6 were discussed in the arbitral tribunal, what was at issue was not a question of work or of supplies; it was, as it is today, a question of payment.

...

But this morning the new conclusions submitted by the Hellenic Government were read to us; in these new conclusions, the Government recognizes *res judicata* and its binding force. But, whereas, in order to give satisfaction to us, the recognition would have had to be without reservation, the Hellenic Government's recognition is limited by reservations and claims which destroy its scope.

Indeed, in paragraph 3 of the conclusions that were read this morning, the Hellenic Government recognizes *res judicata*, subject

to the explicit reservation that it is impossible for it to execute the award in the form in which the award was given. The Government declares that it is ready to discuss the matter and it indicates that its arrangements with the bondholders might serve as a basis for discussion.

Discussion on the basis of the arrangements with the bondholders would among other things—to mention only one aspect—mean the abandonment of payment in gold dollars. And the abandonment of payment in gold dollars, which is ordered by the arbitrators, would imply repudiation of the award.

Accordingly, the recognition given in the conclusions is plainly incapable of satisfying the Belgian Government, since it is limited in scope and its value is destroyed by the reservations which surround it.

Further, in the first paragraph of its conclusions, the Hellenic Government asks that the Belgian Government's conclusions regarding the Hellenic State's violation of its international obligations should be dismissed and asks that the Court should find that it has been prevented by a situation of *force majeure* from executing the arbitral awards.

That, gentlemen, is everything I pleaded this morning and this afternoon. What does the Hellenic Government understand by a case of *force majeure*? If it relates to capacity to pay, let us not discuss it here. If, on the other hand, it understands the case of *force majeure* to relate to the gold clause and the London agreements, the reply is no. I have argued—and I believe that the Court will support my argument—that these events do not constitute *force majeure* and that what is at issue is a voluntary and deliberate repudiation by the Hellenic Government of the award.

...

In short, gentlemen, from the note of 31 December 1936 to this very day, to this morning's proceedings, what the Hellenic Government has sought and still seeks is not a readjustment of its debt with a view to obtaining more time to pay; it is a reduction of its debt, in particular by the elimination of payment in gold.

Modification or reduction of the debt is tantamount to repudiation of the award.

Accordingly, in reply to the conclusions of the Hellenic Government, the Agent of the Belgian Government authorizes me to read to the Court, in his name, our final conclusions, in the following terms:

Having regard to the Belgian Government's submission of 4 May 1938, together with the conclusions and additional conclusions of the two parties,

Noting that the Hellenic Government declares that it recognizes the definitive and binding character of all the provisions of the arbitral awards given in favour of the Société commerciale de Belgique on 3 January and 25 July 1936, but with reservations that destroy the significance of this recognition,

The Belgian Government submits the following:

#### MAY IT PLEASE THE COURT

A. To declare and decide that all the provisions of the arbitral awards given in favour of the Société commerciale de Belgique on 3 January and 25 July 1936 are unreservedly definitive and binding on the Hellenic Government;

B. To declare and decide in consequence:

1. That the Hellenic Government is bound in law to execute the said awards;

2. That the arrangements for the settlement of the external public debt of Greece, to which the Hellenic Government seeks to subordinate the discharge of the monetary obligations imposed upon it, are and should remain without bearing on the execution of the awards;

3. That the Hellenic Government has no grounds whatsoever for seeking to impose on the company or the Belgian Government as a prior condition for payment either the arrangements

for the settlement of its external debt or the abandonment of other rights accorded to the company by the arbitral awards;  
C. To dismiss the submissions of the Hellenic Government.

...<sup>455</sup>

285. After the counsel for the Belgian Government had concluded his statement, he was questioned by Judge Anzilotti as follows:

Mr. ANZILOTTI. Mr. Sand, I believe I heard you say two or three times that if *force majeure* is construed to mean the Hellenic Government's incapacity to pay, the issue is one of fact which is outside these proceedings. As I am not completely sure at this point that that is the view of the Hellenic Government, I should much like to know on what grounds you argue that that question is outside the present proceedings.

Mr. SAND. In setting in motion the present proceedings, the Belgian Government was of course concerned with the failure to pay, to the extent, however, that an attempt was being made to justify this failure on legal grounds. The Hellenic Government held that the arbitral award should be modified in certain respects in its application.

In our view—and it was with this in mind that the initial submission was drafted—if we had been concerned with a State which did not contest the arbitral award, which recognized that the principle of the award was binding on it but which by reason of its financial situation and not on legal grounds was materially and temporarily unable to pay, there would not have been any repudiation of the judicial decision. Such a defence by a State would not have to be interpreted as a demand for the reduction of the debt or a modification of the award or of the arrangements for its execution. If the Hellenic Government had simply maintained: "We have not paid; even now we are not paying, not even interest, because we have no means of paying", there would not have been a dispute of a legal character; incapacity to pay, in the case of an obligation relating to tangibles such as money, never constitutes *force majeure* relieving the debtor of his obligations. In such a case, there could be no proceedings, unless indeed there was manifest ill will.

But the basis of the proceedings we have had the honour to institute in this Court is not a failure to pay on the grounds of material difficulty but a failure to pay based on an attempt to impose the modification of the arbitral award, when we are told: "We will pay you only if you recognize that the award should be modified in such a way."

As I said at the beginning of my argument this morning, we distinguish between legal objections and the purely factual discussion of capacity to pay. All the arguments relating to matters of law point, in our opinion, to faults on the part of the Hellenic Government. Everything to do with the factual situation is outside the purview of this Court.

If in law the Hellenic Government has committed one or more faults, these faults, in the view of the Belgian Government, constitute the repudiation of an acquired right and give ground for maintaining before this Court that international law has been violated.

...

Mr. ANZILOTTI. You have then eliminated this conclusion. In any event, you do not accept that, faced with your demand that the Court should find that the arbitral award has not been executed, the Hellenic Government may invoke what I shall term an exception of *force majeure* based on the Hellenic State's incapacity to pay. That is what I find somewhat intriguing. We may be faced with an exception on the part of the Hellenic Government. I do not see clearly how you can say that this exception has no place in the present proceedings. After all, the complaint is yours.

The exception is not. Perhaps I am wrong; I do not know exactly what the Hellenic Government thinks. But it is a point I should like to be elucidated.

Mr. SAND. The exception raised by the Hellenic Government is based on three considerations. The first two, which are purely factual, are, on the one hand, the payment difficulty it experiences and, on the other, the fact that it is impossible or difficult for it to export gold specie. These are two factual circumstances which might, if the Hellenic Government had made proposals for settlement to the Belgian Government, eventually have led to agreements and discussions within the framework of the arbitral award, without modifying the findings in regard to the principal, the interest or payment in gold or the arrangements envisaged by the arbitrators.

But the Hellenic Government's refusal to execute the award was not based solely on these two difficulties; it was only willing to execute the award if the Belgian Government—and the Société commerciale—agreed to go back on some of the arbitrators' decisions that were contrary to the claims of the Hellenic Government. If, needing to receive the money, the company had yielded to the conditions the Hellenic Government wished to impose on it, it would have been constrained to forego a number of the advantages it had been accorded in the award.

In fact, when the Hellenic Government uses the term *force majeure*, its reasoning is somewhat confused. If it is a matter of a purely factual *force majeure* resulting from the fact that the necessary money is not available to it, this would not amount to a refusal to pay amounting to repudiation of the award; on the contrary, it would recognize the award if it said: "We cannot pay you because we have not the wherewithal to do so". This attitude would not constitute a fault.

But if in contrast the Hellenic Government declares: "We will not pay you in gold dollars, although the arbitrators overruled us on that point; if you want to receive anything else, first give up the claim to the gold dollars", this impairs rights possessed by the company in virtue of the award.

It is true that in the oral explanations given by Mr. Youpis in the course of the hearing yesterday and today, the distinction between the grounds for non-payment based on circumstances and the grounds based on law, which was very clear in the written memorials has become much less clear; counsel for the Hellenic Government combined the legal impediments and the factual impediments in a single type of *force majeure*. They should in fact be separated.

What I tried to do in my rejoinder was to distinguish between the circumstantial impediments and the legal impediments. The former may be outside the control of the Hellenic Government; if the resources needed to pay are lacking, there is no fault calling for international sanction. But if, before paying, the Hellenic Government seeks to impose conditions which it is not entitled to impose, and which the award denied it, it commits a fault that calls for sanction.<sup>456</sup>

286. The counsel for the Greek Government, Mr. Youpis, referred to a question made to him earlier by Judge van Eysinga<sup>457</sup> and to the modified submission of the Belgian Government, and then continued with his oral rejoinder, at the conclusion of which he indicated the final submissions of the Greek Government:

I apologise if I failed in my statement to give a faithful account of the thinking of the distinguished counsel for the Belgian Government; the distinction drawn is indeed too subtle. It is completely impossible for me to accept this theory. I really cannot agree that a debtor who asks that a claim should be reduced or

<sup>455</sup> *Ibid.*, pp. 236, 237, 239 and 253–257.

<sup>456</sup> *Ibid.*, pp. 258–260.

<sup>457</sup> *Ibid.*, pp. 243 and 261.

that the arrangements for payment should be modified is necessarily and in all cases at fault or that he repudiates the award. The degree of impairment of the execution of the award is not in my view a proper criterion. The real criterion is the material circumstance in which the debtor is placed.

The debtor who is unable to comply in full and who seeks to be relieved of part of his debt in conformity with his real possibilities is acting under the influence of a situation of *force majeure* and is not at fault.

It was under the pressure of a case of *force majeure* of this kind that Greece asked its creditors to agree to relief on the external debt, in respect of both the amount of the debt and the currency and arrangements for payment. It was under similar pressure that it approached the Ulen company. Both the creditors and the Ulen company appreciated the justness of its appeal and the correct behaviour of their debtor; it was for this reason that they agreed to grant the relief requested.

Moreover, the other distinction between factual grounds and legal grounds is impossible to conceive. If the legal grounds are genuinely valid and under the rule of law make it impossible for the debtor to comply in full, the debtor is without fault.

Finally, it is impossible to accept that the Court is not competent to decide a dispute in which the debtor State, for circumstantial reasons—for example budgetary difficulties—claims that it is impossible to comply in full. In such a case, the Government acts under the constraint of a case of *force majeure*, and this fact may be the subject of proceedings in the Court.

Mr. Sand maintains the contrary, arguing that the Court is not competent in this case to examine the *force majeure* invoked by the Hellenic Government. But he produces no arguments in support of his contention ...

The Hellenic Government—as I have said before and will with your permission repeat—has at no time voluntarily repudiated its debt while being in a position to discharge it, for at no time since and indeed before the establishment of the claim has it been in a position to pay in full. There would be repudiation only if the Government could pay and refused to do so. To argue that that is the case is impossible, in the light of the well-known financial situation of Greece since 1932.

... Distinguished counsel for the Belgian Government has dwelt at length on article 6 of the agreement. I regret that he has not read it in full; I did so myself, and it is, I believe, unnecessary to do so again at this stage. From a reading of the article, it is clear that the *force majeure* to which it refers relates to the material and technical execution of work; it has nothing to do with supplies and the payment of the debt.

Reference has been made to the interpretation given in the award; the award interpreted the article in relation to the cancellation of the contract—a different matter—and I have already commented on the correctness and binding force of this part of the preamble to the award.

However, the field of application of this article is strictly limited, according to the text: it relates exclusively to the material and technical progress of the work; according to the award, despite the clear intention of the text, it also relates to the cancellation of the contract.

The Belgian Government seeks to extend the field of application of the article and wishes to apply it to another subject, different from the first (the text) and the second (the award); the payment of the debt, which is neither the progress of the work (as the text of the article provides) nor the cancellation of the contract (as the interpretation in the award states). This is, if I may say so, an arbitrary and excessive extension that has no justification either in the text or in the award.

But what bearing would such a clause have, even if it related to the matters with which we are concerned? No agreement concluded in advance can make the full execution of the award pos-

sible if, in fact, it subsequently becomes impossible for the debtor to execute it. Texts are powerless in the face of brutal and ineluctable facts.

That is all I have to say. You will, I hope, permit me, in view of the important changes the Belgian Government has made in its submissions, to put forward new and definitive submissions.

The Hellenic Government has the honour to request that it may please the Court:

1. To dismiss the request of the Belgian Government that the Hellenic State be held to have violated its international obligations; to declare that the Hellenic State has been prevented by a situation of *force majeure* from executing the arbitral awards of 3 January and 25 July 1936;

2. To dismiss the request of the Belgian Government that the Court should order the Hellenic State to pay that Government on behalf of the Société commerciale de Belgique the sums payable to the latter by virtue of the award of 25 July 1936;

Subsidiarily to declare itself incompetent to rule on that request;

...

3. That the Hellenic Government recognizes as *res judicata* the arbitral awards of 3 January and 25 July 1936 relating to the dispute between it and the Société commerciale de Belgique;

4. That however by reason of its budgetary and monetary situation it is materially impossible for it to execute them in the form in which they were formulated;

5. That the Hellenic Government and the Société commerciale de Belgique should enter into discussions on arrangements for the execution of the awards consistent with the budgetary and monetary possibilities of the debtor;

6. That in principle a just and equitable basis for such arrangements is furnished by the agreements concluded or to be concluded by the Hellenic Government with the bondholders of the external public debt;

7. To dismiss all contrary submissions of the Belgian Government.<sup>458</sup>

287. Thereafter, the counsel for the Belgian Government made the following statement:

... Mr. Youpis, summarizing the thesis I have had the honour to put forward and turning towards me to ask whether I was in agreement, sought to attribute to us a distinction between factual impediments which would, in our view, constitute a situation of *force majeure*, and fault on the part of the debtor State which repudiates its debt.

This is a mistake, in the sense that the factual impediment resulting from the financial situation of a State does not, in the present case, constitute a situation of *force majeure*.

In fact, in the case of obligations relating to fungible things, such as a sum of money, there is never *force majeure*, there can only be a more or less prolonged state of insolvency which does not affect the legal obligation to pay; the debtor State continues to be bound, for the obstacle is not insurmountable.

The debt subsists in its entirety, pending the return of more prosperous times. The debtor must pay what he can.

He cannot subordinate these partial payments to an agreement with the creditor State which would among other things have the effect of eliminating the return of more prosperous times and of immediately cutting down the claim on the basis of the present financial situation of the debtor State.

...

The agent of the Belgian Government asks me to add a final word.

If at some later stage, after the issues of law have been decided, the Belgian Government comes to concern itself with the question

<sup>458</sup> *Ibid.*, pp. 263–265, 268–269.

of payments in fact, it will, in doing so, bear in mind the legitimate interests of the company and also the ability to pay of Greece and the traditional friendship between the two countries.

In this spirit, it would, should the occasion arise, be prepared, after a decision has been given with regard to the present submissions, to conclude an agreement with a view to resolving *ex aequo et bono* any difficulties which might arise in connexion with any proposals for effecting payment over a period of time made by Greece.<sup>459</sup>

288. By its *Judgment of 15 June 1939*, the Permanent Court of International Justice, by 13 votes to 2, (1) admitted submission A of the Belgian Government<sup>460</sup> and submission No. 3 of the Greek Government<sup>461</sup> and, noting the agreement between the parties, stated that the two 1936 arbitral awards between the Greek Government and the Société commerciale de Belgique were definitive and obligatory and (2) dismissed the other submissions of both Governments. The Court's opinion included the following remarks relevant to the questions of *force majeure* and impossibility raised by the Greek Government:

No objection was made by the Greek agent to the abandonment by the Belgian agent of the submissions alleging that the Greek Government had violated its international obligations by refusing to pay the arbitral awards in favour of the company. He must indeed be taken to have assented to their being dropped, as he stated that, if the two Belgian claims were withdrawn, the first two Greek submissions as presented on the last day of the hearings would have no importance.<sup>462</sup>

Except as regards the abandonment of the two submissions which were directed particularly to the Belgian submissions that had been withdrawn, the Greek submissions have not undergone any fundamental change in the course of the proceedings. After asking the Court to reject the Belgian contention that there had been a refusal on the part of the Greek Government to execute the arbitral awards, the Greek submissions prayed the Court to declare that the Greek Government acknowledges these awards as having the force of *res judicata*, even if for financial reasons it was unable to pay the sum adjudged to be due to the Belgian company.

In these submissions in their final form, stress is laid upon the need of negotiations between the parties for the conclusion of an agreement as to the execution of the awards (No. 5), a view which appears to be shared by the representatives of the Belgian Government, as at the close of the hearing on May 19th the Belgian counsel intimated that if, after the legal situation has been determined, the Belgian Government should have to deal with the question of payment, it would have regard to the legitimate interests of the Company, to the ability of Greece to pay and to the traditional friendship between the two countries. In this spirit, it would be disposed to conclude a special agreement with a view to settling *ex aequo et bono* any difficulties which might arise in regard to proposals made by Greece for instalment payments.

The submissions before the Court are therefore those presented by the Belgian Government at the hearing on May 17th<sup>463</sup> and those presented by the Greek Government on May 19th.<sup>464</sup> With regard to the latter, it is to be noted, however, that, as has been said above, submissions Nos. 1 and 2 are to be regarded as aban-

doned, because the claims of the Belgian Government as to the violation of international obligations and the award by the Court of the sums due to the Société commerciale de Belgique against which these submissions were directed and the rejection of which they sought, have been withdrawn. The only submissions remaining before the Court are therefore Nos. 3, 4, 5, 6 and 7.

...

... It follows that the Greek submission No. 3 corresponds to the Belgian submission A. Though it is true that the latter submission asks the Court to declare that the provisions of the arbitral awards are "without reserve" definitive and binding upon the Greek Government, it is likewise true that submission No. 3 contains no reservation. The Court will consider later whether the subsequent submissions of the Greek Government are to be regarded as implying a reservation respecting its recognition of *res judicata*. For the moment, it will suffice to note that the two parties are in agreement; the Belgian Government asks the Court to say that the arbitral awards have the force of *res judicata*, and the Greek Government asks the Court to declare that it recognizes that they possess this force.

The submission [B of the Belgian Government] is expressly presented as a consequence of the preceding submission and therefore of the existence of *res judicata*. It is in fact clear that everything in the three paragraphs of this submission follows logically from the definitive and obligatory character of the arbitral awards. If the awards are definitive and obligatory, it is certain that the Greek Government is bound to execute them and to do so as they stand; it cannot therefore claim to subordinate payment of the financial charge imposed upon it to the conditions for the settlement of the Greek external public debt, since that has not been admitted in the awards. Nor can it make the sacrifice of any right of the company recognized by the awards a condition precedent to payment.

Since the Greek Government states that it recognizes the arbitral awards as possessing the force of *res judicata*, it cannot contest this submission of the Belgian Government without contradicting itself. It does not in fact contest it; its submissions regarding the execution of the awards proceed from another point of view, as will presently be seen. The Court may therefore say that the Belgian submission B is neither necessary nor disputed.

The second observation to be made concerns the words "in law" which, in No. 1 of submission B, qualify the obligation of the Greek Government to carry out the arbitral awards. In the opinion of the Court, these words mean that the Belgian Government here adopts the strictly legal standpoint regarding the effects of *res judicata*, a standpoint which, in fact, does not preclude the possibility of arrangements which, without affecting the authority of *res judicata*, would take into account the debtor's capacity to pay.

It is precisely the standpoint of fact and of considerations as to what would be fair and equitable, as opposed to that of strict law, which the Greek Government adopts in its submissions 4, 5 and 6;

...

In order to appreciate the precise import of these submissions, it should above all be borne in mind that, according to the clear declarations made by the parties during the proceedings, the question of Greece's capacity to pay is outside the scope of the proceedings before the Court. It was in order to show that the Belgian submission to the effect that Greece had violated its international obligations—a submission now abandoned—was ill-founded that the Greek Government was led to give a general description of the budgetary and monetary situation of the country. It is not therefore likely that the Greek Government's intention was to ask the Court for a decision on this point in its submission No. 4. In the opinion of the Court, submission No. 4 only raises the question of Greece's capacity to pay in connection with submission No. 5, that is to say the claim that the Greek Government and the Société commerciale de Belgique should be left to negotiate an arrangement corresponding with the budgetary and monetary capacity of the debtor.

<sup>459</sup> *Ibid.*, pp. 270–271.

<sup>460</sup> See para. 284 above.

<sup>461</sup> See para. 286 above.

<sup>462</sup> For the first two Greek submissions, one of which specifically referred to *force majeure*, see para. 286 above.

<sup>463</sup> See para. 284 above.

<sup>464</sup> See para. 286 above.

It follows that, notwithstanding the word "however", submission No. 4 implies no reservation regarding the recognition of *res judicata* in No. 3; it proceeds from a standpoint other than that of the rights acknowledged by the arbitral awards. It also follows that submission No. 4 could be entertained by the Court only if it entertained No. 5; only in that case would it have to consider whether the budgetary and monetary situation of Greece would call for negotiations.

The Court, however, cannot entertain the Greek Government's submission No. 5. Apart from any other consideration, it is certain that the Court is not entitled to oblige the Belgian Government—and still less the company, which is not before it—to enter into negotiations with the Greek Government with a view to a friendly arrangement regarding the execution of the arbitral awards which that Government recognizes to be binding; negotiations of this kind depend entirely upon the will of the parties concerned. It is scarcely necessary to add that, if the Court cannot invite the Greek Government and the Société commerciale de Belgique to agree upon an arrangement corresponding to the budgetary and monetary capacity of the debtor, still less can it indicate the bases for such an arrangement. Submission No. 6 must therefore also be rejected.

Nor could submission No. 4 of the Greek Government be entertained if it were regarded as a plea in defence designed to obtain from the Court a declaration in law to the effect that the Greek Government is justified, owing to *force majeure*, in not executing the awards as formulated. For it is clear that the Court could only make such a declaration after having itself verified that the alleged financial situation really exists and after having ascertained the effect which the execution of the awards in full would have on that situation; in fact, the parties are in agreement that the question of Greece's capacity to pay is outside the scope of the proceedings before the Court.

Nevertheless, though the Court cannot admit the claims of the Greek Government, it can place on record a declaration which Counsel for the Belgian Government, speaking on behalf of the agent for that Government, who was present in Court, made at the end of the oral proceedings. This declaration was as follows:

"If, after the legal situation had been determined, the Belgian Government should have to deal with the question of payments, it would have regard to the legitimate interests of the company, to the ability of Greece to pay and to the traditional friendship between the two countries."

This declaration, made after the Greek Government had presented its final submissions, is in a general way in line with the Greek submissions. It enables the Court to declare that the two Governments are, in principle, agreed in contemplating the possibility of negotiations with a view to a friendly settlement, in which regard would be had, amongst other things, to Greece's capacity to pay. Such a settlement is highly desirable.<sup>465</sup>

289. Judge van Eysinga filed a *dissenting opinion*, in which the following was included:

On the other hand, the Greek submission No. 3, which is less categorical, is followed by submissions Nos. 4, 5 and 6, which are linked to submission No. 3 by a significant "however". Certainly, the Greek Government acknowledges that the awards of 1936 have the force of *res judicata*, but it also asks the Court to say that it is materially impossible for it to execute the awards as formulated (submission No. 4), that negotiations should be begun for an arrangement corresponding with the budgetary and monetary capacity of Greece (submission No. 5) and that, in principle, the fair and equitable basis for such an arrangement is to be found in the agreements concluded or to be concluded by the Greek Government with the bondholders of its external public debt (submission No. 6). Greece is also entitled to have the Court adjudicate on these submissions.

Whereas the final Belgian submissions adopt an exclusively legal standpoint, the Greek submissions Nos. 4 and 6 take another standpoint. What the Greek submission No. 4 asks the Court to do is to adjudicate upon the financial and monetary capacity of Greece, even though the intention of the parties at an earlier stage of the proceedings may have been to leave this question aside. On the basis of the finding asked for by the Greek submission No. 4—a finding to the effect that it is materially impossible for the Greek Government to execute the awards of 1936 as formulated—the Court, according to submission No. 5, should leave it to the Greek Government and the Belgian company to come to an arrangement which would correspond with the budgetary and monetary capacity of Greece and which, according to the Greek submission No. 6, should, in principle, be based on the agreements already concluded or to be concluded with the bondholders of the Greek external debt.

The Court no doubt has jurisdiction to entertain submission No. 4. It is a question of ascertaining a fact: the budgetary and monetary situation of Greece. The ascertainment of this fact in its turn requires an expert report, for the Court cannot adjudicate simply on the basis of what the two parties—notwithstanding their statements that this question should remain outside the scope of these proceedings—have put before it regarding the financial and monetary capacity of Greece. Accordingly, the Court should apply Article 50 of the Statute which provides that it "may, at any time, entrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving an expert report".

Only after such an expert report could the Court adjudicate on Greek submissions Nos. 4 to 7 and upon Belgian submission C.<sup>466</sup> 290. Judge Hudson also filed a *separate opinion*, in which the following, *inter alia*, was stated:

Submission (4) of the Greek Government gives more difficulty. Though it was doubtless presented partly for the purpose of laying a foundation for submissions (5) and (6), I cannot say that such was its only purpose.

In the first place, the text of submission (4) may be regarded as formulating a reservation [with regard] to the Greek Government's recognition of the principle of *res judicata* in connexion with the arbitral awards of 1936. Indeed, in the Greek submission (3) of May 17th, this formulation was avowedly put as a reservation [with regard] to the Greek Government's recognition of the application of that principle; and the same meaning seems to be carried in submission (4) of May 19th by the word *toutefois*. On this interpretation, submission (4) would raise a question as to the legal effect of the budgetary and monetary situation of Greece—a question which was discussed at length by Counsel for the Greek Government in his presentation of the exception of *force majeure*; in my judgment, that question would call for an examination of the municipal law applicable. On this interpretation, submission (4), like the Belgian submissions, would have to be dismissed.

Another possible interpretation of submission (4) would be that the Court is simply called upon to determine, as a fact, that, on account of the budgetary and monetary situation of Greece, it is materially impossible for the Greek Government to carry out the arbitral awards according to their terms. In the written Rejoinder and in the earlier part of the oral proceedings, it was stated that the Greek Government did not ask the Court to deal with the question of Greece's capacity to pay; that Government was free to change its intention in this regard, however. On this interpretation, submission (4) would have the effect of raising the question of Greece's capacity to pay. I think the submission, thus interpreted, should be dismissed for want of proof of the alleged impossibility. Most of the statistics presented to the Court pertain to the budgetary and monetary situation of Greece at an earlier period, and they relate only indirectly to the situation as it now exists. The

<sup>465</sup> P.C.I.J., Series A/B, No. 78, pp. 16, 17 and 19–22.

<sup>466</sup> *Ibid.*, pp. 25–26.

Court is not asked to order an enquiry by experts, and the proofs furnished do not seem to me to call for that course to be taken.

Emphasis is placed by the Greek Government's submission (4) upon the precise terms of the arbitral awards. The award of 25 July 1936 fixed the sum to be paid by the Greek Government to the Société commerciale de Belgique; it provided for interest at the rate of 5 per cent from August 1st 1936, but it did not otherwise provide for any period of time within which the Greek Government was to make payment of the sum due. In the declaration made on behalf of the Belgian Government on 19 May, it was said that the Belgian Government had never intended to demand a single payment in full of the sum due, the inference being that it does not so intend now. This being the case, it would seem to be unnecessary to enquire into the Greek Government's capacity to make a single payment in full of the sum due; to this extent, submission (4), viewed as a request for a finding of fact, ceased to have any object after the Belgian declaration.

As to submission (3) of the Greek Government, I agree that the Court may take note of the Greek Government's recognition of the principle of *res judicata* as applied to the two arbitral awards of 1936, but I think that, in admitting submission (3), the operative part of the judgement should not go further than this.<sup>467</sup>

#### THE CASE OF THE ELECTRICITY COMPANY OF SOFIA AND BULGARIA (*Belgium v. Bulgaria*) (1940)

291. In the course of proceedings instituted by Belgium in 1938 against Bulgaria, the Court was faced with the contention by the Bulgarian Government that *force majeure* resulting from the Second World War prevented it from presenting its rejoinder within the time-limits fixed by the Court. That Government also contended that as a consequence of the war it was impossible for the Bulgarian agent to collaborate with foreign counsel and informed the Court that it had forbidden, owing to serious risks to personal safety, the departure from Bulgaria of its agent and its designated national judge.

292. On 2 October 1939, two days before the expiration of the time-limit set by the Court for the filing of a Bulgarian rejoinder, the Bulgarian agent sent the following telegram to the Court:

Sofia—2 October 1939—Have honour inform Court that recent events have prevented my collaboration with advocate for Bulgarian defence French Professor Gilbert Gidel and that owing to circumstances of *force majeure* resulting from the war am unable present Bulgarian Rejoinder—ALTINOFF Minister Plenipotentiary Agent Bulgarian Government.<sup>468</sup>

293. The Belgian agent, upon being informed of this message, replied by a telegram of 3 October 1939 that his Government "makes no objection to reasonable extension time-limit having regard *force majeure*",<sup>469</sup> but that it would submit to the Court a request for interim measures of protection. The Court extended the time-limit for the filing of a Bulgarian rejoinder to 4 January 1940.

294. As to the Belgian request for interim measures of protection, the Court fixed 24 November 1939 as the time-limit for Bulgaria to present any written observations thereon. In that regard, the Bulgarian

agent sent the following telegram dated 18 November 1939:

Sofia—18 November 1939—In reply second Belgian incidental request am instructed by Bulgarian Government inform Court that in consequence of war impossible for Bulgarian agent collaborate with foreign counsel in preparation Bulgarian defence and that owing to necessity of crossing belligerent countries to reach Hague involving serious risks personal safety Bulgarian Government forbids departure national judge Papazoff and Bulgarian agent *stop* Having regard this situation of *force majeure* Bulgarian Government does not consider itself bound to submit Court observations asked for but declares many reasons exist for rejection Belgian request interim measures—ALTINOFF Minister Plenipotentiary Agent Bulgarian Government.<sup>470</sup>

295. After the Court's *Order of 5 December 1939* adjudicating the Belgian request for interim measures of protection,<sup>471</sup> the Bulgarian agent sent the following telegram dated 2 January 1940 to the Court:

Sofia—January 2nd, 1940—Have honour inform Court that Bulgarian Government reiterates its statement concerning existence of circumstances of *force majeure* for reasons given in my two earlier telegrams of 2 October and 18 November in consequence of which it does not consider itself bound to present Bulgarian Rejoinder to Court by date fixed *stop* According to official information advocate for Bulgarian defence well-known Professor Gilbert Gidel has been mobilized in French army—ALTINOFF Minister Plenipotentiary Agent Bulgarian Government.<sup>472</sup>

296. The Belgian agent, having received a copy of the above Bulgarian telegram, sent to the Court a letter dated 24 January 1940, which included certain observations in the form of submissions:

Sir,—On the 4th instant you were good enough to inform me of the text of a telegram from the agent for the Bulgarian Government dated 3 January, regarding the case now pending between the State of Belgium and the State of Bulgaria (the case of the Electricity Company of Sofia and Bulgaria).—The attitude adopted by the Bulgarian Government in this telegram with regard to *force majeure* calls for certain observations on the part of the Belgian Government which I have the honour to submit to the Court in the form of submissions the text of which is attached.—I have, etc.—J. DE RUELLE, Agent for the Belgian Government.—*Case concerning the Electricity Company of Sofia and Bulgaria*.—SUBMISSIONS.—Having regard to the telegram sent by the agent for the Bulgarian Government to the Registrar of the Court on 3 January, —Whereas the Belgian Government cannot accept the contention therein set forth, namely that the state of war at present existing between certain countries constitutes a situation of *force majeure* preventing the continuation of the proceedings which should therefore be suspended indefinitely until the end of the war,—Whereas this contention is unreasonable, calculated to obstruct the rights of the applicant party and inconsistent with the high mission of the Court,—Whereas neither of the parties to the case is involved in the hostilities, nor is the Netherlands, where the seat of the Court is established,—Whereas it can be established, if the fact be denied, that communications between these three countries have not been interrupted,—Whereas furthermore if the Court, which has sole responsibility for its procedure, should for

<sup>470</sup> *Ibid.*

<sup>471</sup> *Ibid.*, No. 79. By that Order, the Court indicated as an interim measure that pending the Court's final judgement of the suit, Bulgaria should ensure "that no step of any kind is taken capable of prejudicing the rights claimed by the Belgian Government or of aggravating or extending the dispute submitted to the Court" (*ibid.*, p. 9).

<sup>472</sup> *Ibid.*, No. 80, p. 7.

<sup>467</sup> *Ibid.*, pp. 29–31.

<sup>468</sup> *Ibid.*, No. 80, p. 6.

<sup>469</sup> *Ibid.*



any reason see fit to grant a final extension of time, the Belgian Government would not raise any objection, as it stated in the course of the oral proceedings in regard to the indication of interim measures of protection,—Whereas, however, no such limited step is contemplated in the above-mentioned telegram of the agent for the Bulgarian Government,—For these reasons,—May it please the Court,—To declare that there is no ground for the suspension of its proceedings, the argument of *force majeure* having been wrongfully invoked by the respondent party,—and to afford the applicant party an opportunity if need be of presenting additional submissions for the continuation of the proceedings after the Court has rendered the decision here sought.—Brussels, 24 January, 1940. J. DE RUELLE, Agent for the Belgian Government.<sup>473</sup> 297. In its *Order of 26 February 1940*, the Court discussed the matter as follows:

Whereas, in the first place, the Court is called upon to consider whether the alleged impossibility of collaborating with a foreign advocate and the alleged risks of the journey to The Hague constitute circumstances of *force majeure* affording justification for the non-presentation of its Rejoinder by the Bulgarian Government on January 4th, 1940, the date fixed after the extension of the time-limit by the Order of October 4th, 1939;

Whereas, in regard to this question, it is, on the one hand, for the Bulgarian Government, if it desires to have the assistance of an advocate, to select some advocate of its own or a foreign nationality, whose collaboration in the present circumstances can be effectively secured, and, on the other hand, it has not been established that in actual fact there has been or is up to the present time anything to impede travelling and communications between Bulgaria and the seat of the Court;

Whereas the facts alleged do not therefore constitute a situation of *force majeure* calculated to justify the Bulgarian Government for having failed to observe the time-limit which was granted to it for the filing of a Rejoinder and which expired on January 4th, 1940;

Whereas it appears from the Memorial and Counter-Memorial respectively filed in accordance with the Orders of March 28th, August 27th, 1938, and April 4th, 1939, that, as provided by Article 42 of the rules, on the one hand, the Belgian Government, the applicant, has presented its statement of the facts, its statement of law and its submissions, and, on the other hand, the Bulgarian Government, the respondent, has stated whether it admits or denies the facts set out in the Belgian Memorial, has presented its additional facts, its observations concerning the statement of law in the Belgian Memorial, its own statement of law in answer and its submissions;

Whereas the Bulgarian Government, by now abstaining without valid reasons from presenting a Rejoinder in response to the Belgian reply of August 19th, 1939, as it had the opportunity of doing up till January 4th, 1940, pursuant to the Order of April 4th, 1939, and the extension of time granted by the Order of October 4th, 1939, cannot thus of its own volition prevent the continuation of the proceedings instituted and the due exercise of the powers of the Court in accordance with the Statute and rules;

Whereas the Belgian Government, in its observations presented in the form of submissions on January 24th, 1940, expressly asks the Court that the proceedings shall not be suspended and that an opportunity shall be afforded it, if need be, of presenting additional submissions for the continuation of the proceedings;

Whereas in these circumstances the written proceedings must be regarded as terminated and the case is, under Article 45 of the rules, ready for hearing;

Whereas, under Article 47, paragraph I, of the rules, the Court must now fix the date for the commencement of the oral proceedings;

Whereas furthermore regard must be had in this connection to the time necessary to enable the parties to prepare their respective oral arguments;

FOR THESE REASONS,

The Court

fixes May 16th, 1940, as the date for the commencement of the oral proceedings in the suit brought before the Court by the application of the Belgian Government filed with the Registry of the Court on January 26th, 1938.<sup>474</sup>

#### THE CORFU CHANNEL CASE (MERITS) (*United Kingdom v. Albania*) (1949)

298. On 22 October 1946, two British warships proceeding through the North Corfu Channel struck mines within Albanian territorial water, suffering damage to the vessels and loss of life. According to the United Kingdom Government, 44 sailors were killed and 42 injured, and the two ships were crippled, one becoming a total loss. After filing a protest with the Albanian authorities, the British Government conducted, without Albanian consent, a sweep of the Corfu Channel on 12 and 13 November 1946, finding 22 moored mines. It was alleged, on the basis of expert examination, that the mines had been laid only a very short time before the date of the explosion.

299. On 9 December 1946, the Government of the United Kingdom delivered a note to the Albanian Legation in Belgrade, in which it expressed its belief that the Albanian authorities had maintained a close watch on all ships making use of the North Corfu Channel ever since 15 May 1946, when two British warships were fired at from Albanian shore batteries, and charged that:

... It is certain that no mine-field could have been laid in the Channel within a few hundred yards of the Albanian batteries without the connivance or at least the knowledge of the Albanian authorities.

<sup>474</sup> *Ibid.*, pp. 8–9. As to the later developments in the case, the sixteenth report of the Court (15 June 1939 to 31 December 1945) included the following summary:

“... By reason of the invasion of the Netherlands, the oral proceedings could not be initiated.

“In anticipation of the meeting of the Court in October 1945, the Registrar wrote on 3 September 1945 to the Belgian Government, referring to the succession of events since 10 May 1940, which had rendered communications with that Government impossible, and asking what course it proposed to adopt with regard to the proceedings which it had instituted. The Belgian Minister for Foreign Affairs, in a letter dated 24 October 1945, replied: ‘As present circumstances warrant the hope that there will no longer be any occasion for the Belgian Government to exercise its right to protect the Belgian company ... the Belgian Government does not intend to go on with the proceedings instituted before the Court ... and asks that the case should be struck out of the Court’s list’. This notice of discontinuance was notified to the respondent party by a communication dated 2 November 1945. The Registrar informed the latter at the same time that the President of the Court, in accordance with Article 69, paragraph 2, of the rules, fixed 1 December 1945 as the date by which it might enter an objection to the discontinuance of the proceedings. No objection on the part of the respondent party was received by the Registry.” (*Ibid.*, Series E, No. 16, p. 143.)

<sup>473</sup> *Ibid.*, pp. 7–8.

19. His Majesty's Government must accordingly conclude that the Albanian Government either laid the mine-field in question or knew that it had been laid. The Albanian Government has thus committed a flagrant breach of international law. Under articles 3 and 4 of the Eighth Hague Convention of 1907, any Government laying mines in wartime, and *a fortiori* in peace, is bound to notify the danger zones to the Governments of all countries. (This obligation in fact applies even if the zones in question are not normally used by shipping.) Not only has the Albanian Government never made any public notification of this mine-field but it has also made no comment on the continued issue of the relevant MEDRI [Mediterranean Route Instructions] charts and pamphlets. It thus endorsed a clear statement by the recognized international authority concerned to the shipping of the world that the Channel was safe for navigation ...<sup>475</sup>

The United Kingdom Government thus demanded from the Albanian Government an apology in respect of the "unprovoked attacks upon the Royal Navy" which took place on 15 May and 22 October and an assurance that there should be no repetition of the "unlawful action". It further demanded that reparation be paid for the damage suffered by the ships and that full compensation be paid to the relatives of the 44 officers and seamen who lost their lives in consequence of action on the part of the Albanian Government.

300. A similar argument was advanced by the United Kingdom representative in the Security Council on 18 February 1947.<sup>476</sup>

301. In a note of 21 December 1946, the Albanian Government rejected all the accusations made by the British Government, especially the charge that "the Albanian Government itself placed the mines or was aware that others had placed them or again knew of the presence of mines" in the Channel.<sup>477</sup>

302. On 22 May 1947, the Government of the United Kingdom submitted its application to the International Court of Justice, in which it claimed:

(1) that the Albanian Government either caused to be laid, or had knowledge of the laying of, mines in its territorial waters in the Strait of Corfu without notifying the existence of these mines as required by articles 3 and 4 of Hague Convention No. VIII of 1907, by the general principles of international law and by the ordinary dictates of humanity; (2) that two destroyers of the Royal Navy were damaged by the mines so laid, resulting in the loss of lives of forty-four personnel of the Royal Navy and serious injury to the destroyers; (3) that the loss and damage referred to in (2) was due to the failure of the Albanian Government to fulfil its international obligations and to act in accordance with the dictates of humanity; (4) that the Court shall decide that the Albanian Government is internationally responsible for the said loss and injury and is under an obligation to make reparation or pay compensation to the Government of the United Kingdom therefor; and (5) that the Court shall determine the reparation or compensation.<sup>478</sup>

The United Kingdom Government repeated its case in its memorial submitted to the Court on 30 September 1947. It first summarized "the established rules

of international law" relating to the laying of mines as follows:

(a) A State which lays, or connives in the laying of mines without the special necessity which in war exonerates from liability belligerents and neutrals acting in conformity with the Eighth Hague Convention commits a breach of international law and an international delinquency.

(b) A State which lays, or connives in the laying of, mines in a channel of navigation as in (a) and fails to satisfy the categorical requirements of the Eighth Hague Convention concerning advance notification of the mine-laying, is guilty of an offence against humanity which most seriously aggravates the breach of international law and the international delinquency committed by that State.

...<sup>479</sup>

It then contended that, in the case in question, the Government of Albania did violate those rules, stressing that:

The laying of the minefield by itself was, without question, an international delinquency of a grave character. The responsibility of Albania rests, firstly, upon a direct complicity in the existence of the minefield, which is created by its knowledge of it, whether or not it laid it or connived in its actual laying. Secondly, it rests upon a failure—which was, in the submission of the Government of the United Kingdom, a wilful failure—to discharge an imperative international duty to notify the existence of this dangerous minefield. Thirdly, it rests upon the failure of the Albanian authorities to warn His Majesty's ships of their danger when they were seen to be approaching it.<sup>480</sup>

303. In its *Judgment of 9 April 1949*, the Court found the alleged laying or connivance in laying of the mines by Albania not proved by evidence. It concluded, however, "that the laying of the minefield which caused the explosions ... could not have been accomplished without the knowledge of the Albanian Government".<sup>481</sup> It then pointed out various obligations on the part of Albania arising out of such knowledge, including the obligation to notify shipping of the existence of mines in its waters. Although it was unable to find out the exact date of the minelaying, the Court argued that, even if it had taken place at the last possible moment, thus preventing the Albanian Government from giving a general notification to shipping at large before the time of the explosion, it "would certainly not have prevented the Albanian authorities from taking, as they should have done, all necessary steps immediately to warn ships near the danger zone, more especially those that were approaching that zone".<sup>482</sup> It then declared:

In fact, nothing was attempted by the Albanian authorities to prevent the disaster. These grave omissions involve the international responsibility of Albania.

The Court therefore reaches the conclusion that Albania is responsible under international law for the explosions which occurred on 22 October 1946, in Albanian waters, and for the damage and loss of human life which resulted from them and that there is a duty upon Albania to pay compensation to the United Kingdom.<sup>483</sup>

<sup>475</sup> *I.C.J. Pleadings, Corfu Channel*, vol. I, pp. 14–15.

<sup>476</sup> See *Official Records of the Security Council, Second Year, No. 15*, 107th meeting.

<sup>477</sup> *I.C.J. Pleadings, Corfu Channel*, vol. I, p. 181.

<sup>478</sup> *Ibid.*, p. 9.

<sup>479</sup> *Ibid.*, p. 40.

<sup>480</sup> *Ibid.*, p. 48.

<sup>481</sup> *I.C.J. Reports, 1949*, p. 22.

<sup>482</sup> *Ibid.*, p. 23.

<sup>483</sup> *Ibid.*

304. In a *dissenting opinion*, Judge Badawi Pasha discussed whether, apart from connivance or knowledge, Albania committed a fault which might have caused the explosion and upon which its international responsibility for the damage might eventually be founded. He said:

The United Kingdom did not maintain, as an alternative ground of responsibility, that such a fault existed. Counsel for the United Kingdom even declared formally that, unless it had knowledge, Albania was not responsible.

However, the opinion was expressed that the terms used in the Special Agreement are general and cover all cases of international responsibility, and that it is for the Court to examine whether such a fault can be proved to have been committed by Albania.

Before examining this aspect of the question, it must be stressed that international law does not recognize objective responsibility based upon the notion of risk, adopted by certain national legislations. Indeed, the evolution of international law and the degree of development attained by the notion of international co-operation do not allow us to consider that this stage has been reached, or is about to be reached.

The failure of Albania to carry out an international obligation must therefore be proved, and it must also be proved that this was the cause of the explosion.

Some are of the opinion that a general obligation exists for States to exert reasonable vigilance along their coast and that the failure of Albania to act with due diligence was, in the absence of knowledge on its part, the reason that the minefield remained undiscovered and that it caused the explosion.

Such a general obligation does not exist and cannot exist. Even assuming that it does exist, the causal nexus between the failure to carry out the obligation and the explosion remains to be shown.<sup>484</sup>

305. Judge Krylov, also in a *dissenting opinion* wondered if it was not possible to found the international responsibility of Albania on the notion of *culpa*. He asked if it could be argued that Albania "failed to exercise the diligence required by international law to prevent the laying of mines in the Corfu Channel".<sup>485</sup> His answer was "no":

The responsibility of a State in consequence of an international delinquency presupposes, at the very least, *culpa* on the part of that State. One cannot found the international responsibility of a State on the argument that the act of which the State is accused took place in its territory—terrestrial, maritime, or aerial territory. One cannot transfer the theory of risk, which is developed in the municipal law of some States, into the domain of international law. In order to found the responsibility of the State, recourse must be had to the notion of *culpa*. I refer to the famous English author, Oppenheim. In his work on international law, he writes that the conception of international delinquency presumes that the State acted "wilfully and maliciously", or in cases of acts of omission "with culpable negligence" (vol. 1, para. 154). Mr. Lauterpacht, the editor of the 7th edition (1948), adds that one can discern among modern authors a definite tendency to reject the theory of absolute responsibility and to found the responsibility of States on the notion of *culpa* (p. 311).

As I have already stated, I cannot find in the organization and functioning of the Albanian coastal watch—having regard to the limited resources of that small country—such a lack of diligence as might involve the responsibility of Albania. I do not find any evidence of *culpable negligence*.<sup>486</sup>

306. Judge Krylov then took up the question whether Albania had incurred responsibility owing to its failure to warn the British ships of their imminent danger on 22 October 1946. He said that, even if Albania had known of the existence of the minefield before that day, the Albanian coastal guard service "could not have warned the British ships of the fact on that day",<sup>487</sup> for, having regard to the circumstances of the passage of the ships on that day, the coastal guards had neither sufficient time nor the necessary technical means for giving such a warning.

307. In another *dissenting opinion*, Judge Azevedo contended that the notion of *culpa* was always changing and undergoing a slow process of evolution; "moving away from the classical elements of imprudence and negligence, it tends to draw nearer to the system of objective responsibility; and this has led certain present-day authors to deny that *culpa* is definitely separate, in regard to a theory based solely on risk".<sup>488</sup> He continued:

... By departing from the notions of choice and of vigilance, we arrive, in practice, at a fusion of the solutions suggested by contractual *culpa* and delictual *culpa*.

And so, without prejudice to the maintenance of the traditional import of the word *culpa* and to avoid the difficulty of proving a subjective element, an endeavour has been made to establish presumptions that would simply shift the burden of proof, as in the theory of bailment, in which a mere negative attitude—a simple proof of absence of *culpa* on the part of a bailee—is not sufficient. The victim has only to prove damage and the chain of causation and that is enough to involve responsibility, unless the defendant can prove *culpa* in a third party, or in the victim, or *force majeure*; only these can relieve him from responsibility.

This tendency has already invaded administrative law (notion of *faute de service*) and *a fortiori* must be accepted in international law, in which objective responsibility is much more readily admitted than in private law.<sup>489</sup>

308. In the present case, Judge Azevedo said that even if it was not possible to prove the knowledge of the mining on the part of Albania, one could examine whether Albania "ought to or could have had cognizance" of the matter. Examining the case from the standpoint of *culpa*, he was struck by the weakness of the Albanian defences along a deserted coastline and concluded that "it ought to have been recognized that Albania, ... failed to place look-out posts at the spots considered most suitable when the coast defences were organized about May 1946. Albania must therefore bear the consequences ... the possibility of negligence on the part of the coastal Power, involving that Power's responsibility, cannot be set aside ...".<sup>490</sup>

309. Again, Judge Eçer, in a *dissenting opinion*, briefly contended that the responsibility of a State assumed either *dolus* or *culpa* on its part, quoting, like Judge Krylov, the following extract from the course on international law of Oppenheim-Lauterpacht (*The International Law*, 1948, p. 311):

<sup>487</sup> *Ibid.*

<sup>488</sup> *Ibid.*, p. 85.

<sup>489</sup> *Ibid.*, p. 86.

<sup>490</sup> *Ibid.*, pp. 93–94.

<sup>484</sup> *Ibid.*, p. 65.

<sup>485</sup> *Ibid.*, p. 71.

<sup>486</sup> *Ibid.*, p. 72.

“An act of a State injurious to another State is nevertheless not an international delinquency if committed neither wilfully and maliciously nor with culpable negligence.”<sup>491</sup>

CASE CONCERNING RIGHTS OF NATIONALS OF THE UNITED STATES OF AMERICA IN MOROCCO (*France v. United States of America*) (1952)

310. One of the issues in this case involved the application to United States nationals of a 1948 decree issued by the Resident General of the French Republic in Morocco concerning the regulation of imports into the former French Zone of Morocco. The French Government contended, *inter alia*, that that decree was in conformity with the treaty provisions which were applicable to Morocco and binding on France and the United States. That contention was disputed by the United States Government, which maintained, *inter alia*, that it was entitled by treaties with Morocco to a régime of free trade with that State without restrictions or prohibitions on imports, save those which were specified in the treaties. The United States recalled its 1836 treaty with Morocco, by which it was accorded most-favoured-nation treatment and contended that, by virtue of that treaty, it had been, and continued to be, entitled to a régime of free trade with Morocco, by virtue of treaties providing for such a régime (with certain specified exceptions) concluded by Morocco with Great Britain in 1856 and Spain in 1861.

311. The submissions of the two Governments included arguments as to the continued validity or modifications of those treaties or portions thereof. The French Government also contended, *inter alia*, that the 1948 decree involved the enforcement of exchange control and adduced arguments in favour of the validity of such exchange controls. In the course of his oral argument of 16 July 1952, the assistant agent of the French Government, Mr. Reuter, referred to the question of principle regarding the validity of exchange control as it related to various treaties, and referred in particular to the question of *force majeure* in relation to the 1856 Anglo-Moroccan Treaty:

Let us assume that it is accepted that article 2 of the trade treaty between Great Britain and Morocco, which is the most specific in its formulation, forbids any prohibition of imports regardless of the circumstances; the conclusion is that Morocco has no right to subject imports to exchange control, save of course the pipes, smoking tobacco, sulphur and other products enumerated in the article. If such was to be the conclusion drawn from an examination of the treaties, the French Government would raise an exception, namely the exception of *force majeure*. International law admits the exception of *force majeure*. It will suffice to quote here a celebrated decision of the Permanent Court of Arbitration at The Hague, handed down on 11 November 1912 in a dispute between Russia and Turkey. The question at issue was whether the Turkish Government could invoke financial difficulties as grounds for the non-payment of a liquid debt payable to the Russian Government. The Court of Arbitration of The Hague stated that the exception of *force majeure* could be argued in international public law. It determined that it was not applicable in the case

before it because, as it declared, the payment of the sums due “would not have imperilled the existence of the Ottoman Empire or seriously jeopardized its internal or external situation”.

It is necessary to show that the facts constituting *force majeure* possess three characteristics: that they should be unforeseeable, be external to the State invoking *force majeure*, and constitute a constraint that prevents the State from fulfilling its obligation. These three characteristics are present in the case before us. It is easy, in short, to show that here unforeseeability and externality can be demonstrated simultaneously.

At the time when the Treaty of 1856 was signed, all currencies were convertible. The money obtained from a sale in a given country could be used to obtain a product in any other country. Since the Second World War, that is no longer the case; all, or nearly all, States have determined that their monies are non-convertible. This is a fact external to Morocco and leading to an ineluctable consequence: Morocco must purchase from those who purchase from it, and it is no longer physically possible for Morocco to choose the countries with which it wishes to trade. This rule is the consequence of an absolute necessity of a physical nature which can disappear only through the general return of monies to convertibility or through the possession by Morocco of a considerable mass of convertible currency, neither of which has been the case.

Is it really necessary to demonstrate at length that in the existing circumstances the suppression of exchange controls would imperil the fundamental economic equilibrium of many States?

Two pieces of evidence on this point will suffice.

The first is drawn from the report of the Executive Directors of the International Monetary Fund at the first annual meeting of the Board of Governors (p. 11). I will ask the Court's permission to read an extract from this report; it will be seen that the terms used are identical with those employed earlier by the Court of Arbitration at The Hague:

“During the war, exchange controls and restrictions were essential to mobilize and conserve foreign exchange resources; their continuance now reflects the inadequacy of a country's foreign exchange resources relative to its needs and the importance of guarding against disturbing capital movements. In most countries, there is a severe shortage of goods of all kinds that must be obtained from abroad. In such countries, exchange controls are unavoidable for a time, in order to ensure that the most essential requirements for consumption and reconstruction will be met out of these limited foreign exchange resources. The Fund Agreement recognizes that many countries will have to continue to use the machinery of exchange control to prevent the depletion of their exchange resources and the weakening of their international economic position through capital flight.”

In fact, apart from the United States of America, only a very few States have been able to give up these controls.

Proof of this may be drawn from the second example cited.

One large State, the United Kingdom, attempted to return to free convertibility. It undertook to do so in a treaty of 6 December 1945 with the United States of America (*Treaty Series*, No. 53 (1946), Cmd. 6968).

After a short trial, it was forced to give up the undertaking and restore strict controls. The United Kingdom is not in the habit of failing to hold to its financial commitments on any grounds other than those of *force majeure*. The ineluctable necessity of its restoring exchange controls was recognized in an exchange of letters dated 20 August 1947 between the United States Government and the United Kingdom Government (Cmd. 7210).

This argument of *force majeure* has the advantage of showing what lies at the root of exchange control, but it will not detain us further, for we must now go beyond the text of article 2 only of the Treaty of 1856, in order to contemplate the Treaty as a whole ...<sup>492</sup>

<sup>491</sup> *Ibid.*, p. 128.

<sup>492</sup> *I.C.J. Pleadings, Morocco Case*, vol. II, pp. 182–184.

312. The oral argument presented on 21 July 1952 by the agent of the United States Government, Mr. Fisher, included the following:

Thus, neither the fluctuation of the franc on the Paris black market nor the dollar gap of Morocco would appear to constitute a situation of *force majeure* or to present a situation involving the doctrine of *ordre public* which would justify the abrogation of American treaty rights without the agreement of the United States.

The United States believes that the arguments which have already been advanced have demonstrated that the French Government has not established the necessary foundation in fact to support its argument that considerations of *ordre public* or *force majeure* justify their establishing a system of prohibition of imports in violation of the treaty rights of other Powers without the consent of those Powers . . .<sup>493</sup>

<sup>493</sup> *Ibid.*, pp. 241, 248–249. With regard to the passages quoted, the arguments advanced by the United States, to which reference is made, related principally to the argument presented by the French Government concerning *l'ordre public*. To summarize briefly, the French Government maintained that the 1906 Act of Algeciras authorized, and the international community of nations recognized, the validity of a State taking measures to ensure its *ordre public*, notwithstanding treaties which purported to accord to certain States the right to import freely. It was pointed out that restrictions had been imposed by Morocco where the maintenance of its *ordre public* required it in cases concerning public health, public morals and the control of trade in time of war. (See, e.g., *ibid.*, pp. 20–26 and 192–203.) It was further contended by France that:

“... the Act of Algeciras, except where expressly stipulated to the contrary, respects Sherifian sovereignty and requires Morocco to undertake reforms such as will make it a modern State. In this case, it is authorized to establish any import prohibitions intended to foster respect for *ordre public*. The former treaties, even where there is doubt as to their scope, cannot be applied so as to counter these reforms. ... Now, restrictions on imports on financial and monetary grounds are restrictions for purposes of *ordre public*. Exchange control is a means of organizing what is in short supply. If the shortage is real, the absence of action by the State would result in serious disorder. There is no State, no treaty, no international organization which has not recognized this fundamental truth ...

“... in the community of civilized nations, the installation of a free system with no inequality does not mean prohibiting exchange control for the purpose of safeguarding the equilibrium of the balance of payments. ... Economic freedom in the civilized world is never absolute or unconditional. ... Freedom of exchange has never prevented measures for the defence of *ordre public* ... The practice of civilized nations has recognized that exchange control, where there is serious imbalance in the balance of payments, is a legitimate measure of *ordre public*. (*ibid.*, pp. 23 and 192.)”

The United States viewed the argument invoking *l'ordre public* as specious and insupportable (see e.g. *ibid.*, pp. 93–106 and 238–262). It was of the opinion, however, that it was perfectly reasonable to interpret the principle of economic liberty as meaning that imports should not be prohibited, except those genuinely needed for the protection of public health and morals and control of trading with the enemy in time of war. It stressed that the 1948 Decree was not applied as a means of enforcing exchange control but rather as a means of imposing import restrictions. As to the contention invoking *ordre public* in that regard, the United States stated that:

“... The specific cases which are listed as being normal applications of the theory of *ordre public* are disparate cases among which there is little if any rational relationship, unless it be that any purpose in which the State has an interest is covered by the theory. Any doubt on this point cannot subsist in the face of the flat assertion of the Reply that all restrictions placed on imports on financial and monetary grounds are restrictions based on considerations of *ordre public* because their purpose is to protect the financial or economic interests of the State. There are no import restrictions or prohibitions for which some financial or

313. By its *Judgment of 27 August 1952*, the International Court of Justice, *inter alia*, unanimously rejected the submissions of the French Government relating to the 1948 Decree issued by the French Resident General in Morocco. It decided that by virtue of the most-favoured-nation clause included in the 1836 Treaty between Morocco and the United States, and in view of the rights acquired by the United States under the 1906 Act of Algeciras, the United States had the right to object to any discrimination in favour of France, in the matter of imports in the French Zone of Morocco. As to the contentions concerning the legality of exchange control, the Court stated as follows:

The Government of France has submitted various contentions purporting to demonstrate the legality of exchange control. The Court does not consider it necessary to pronounce upon these contentions. Even assuming the legality of exchange control, the fact nevertheless remains that the measures applied by virtue of the Decree of 30 December 1948 have involved a discrimination in favour of imports from France and other parts of the French Union. This discrimination can not be justified by considerations relating to exchange control.<sup>494</sup>

CASE CONCERNING THE ARBITRAL AWARD MADE BY THE KING OF SPAIN ON 23 DECEMBER 1906 (*Honduras v. Nicaragua*) (1960)

314. This case was based upon the allegation by Honduras that the failure of Nicaragua to give effect to the arbitral award made on 23 December 1906 by the King of Spain concerning the demarcation lines of the boundary between Honduras and Nicaragua constituted a breach of an international obligation. In its final submissions to the International Court of Justice, Honduras requested the Court to adjudge and declare that Nicaragua was under an obligation to give effect to the above-mentioned arbitral award. Nicaragua contended, *inter alia*, that the “so-called ‘arbitral’ decision was in any case incapable of execution by reason of its omissions, contradictions and obscurities”<sup>495</sup>

315. In the written and oral presentations with regard to this particular point, much attention was devoted to detailed accounts and interpretations of the

economic justification cannot be given. The theory of *ordre public* advanced in the Reply simply purports to vest such arbitrary justifications with the character of legitimacy. It is hardly necessary to point to the threat to the stability of international relations which is implicit in this concept of *l'ordre public*. Besides being an innovation, the theory is a negation of the whole international treaty structure, since it permits States to avoid treaty obligations through the simple expedient of selecting, if not creating, a given internal condition and claiming that compliance with the obligation would create a danger, actual or threatened, to the amorphous whole known as *l'ordre public*. ...” (*ibid.*, p. 99).

In the context of the present survey, the contention concerning *l'ordre public* in this case appears to be more related to the concept of “state of emergency” (*état de nécessité*) (see paras. 20–30 above concerning the distinction between that concept and that of *force majeure*).

<sup>494</sup> *I.C.J. Reports*, 1952, p. 186.

<sup>495</sup> *I.C.J. Reports*, 1960, p. 199.

arbitral award and various other documentation related to the determination by the King of Spain of the precise demarcation of the boundary. In the oral hearings, however, the representatives of the two Governments made some general observations concerning the claim that an arbitral award was incapable of execution because of omissions, contradictions and obscurities.

316. In the oral argument of 23 September 1960 presented by one of the counsel for the Government of Honduras, Mr. Briggs, the following was said:

For purposes of information, I am constrained to deal with one more Nicaraguan argument—not because it is important but because Nicaragua pretends to rely on it. I refer to the oft-repeated Nicaraguan argument that the award of the King of Spain is not capable of execution, even if its validity be accepted. Nicaragua contends that there are gaps in the award, that it contains obscurities and contradictions which would make it impossible for the parties to execute the award even if they both possessed the will to do so. On the face of it, this evokes scepticism.

Moreover, there are no gaps in the award of the King of Spain. The alleged obscurities and contradictions are pitiful inventions of a disappointed suitor. Paragraph 91 of the Nicaraguan Counter-Memorial itself contains so many contradictions and obscurities that it is not even clear whether Nicaragua regards these alleged defects as a ground for the nullity of the award or as an independent excuse for non-performance by Nicaragua of its international obligations. Contemporaneously, that is to say prior to 1912, Nicaragua herself did not regard these alleged defects of the award as a ground for nullity, but only for clarification.

My colleague, Professor Guggenheim, has demonstrated that international law recognizes no ground of nullity in the alleged errors of an award. And if Nicaragua was really convinced that the award contained obscurities which prevented it from co-operating in its execution, the proper procedure would have been to request the Arbitrator for a clarification of the award. The fact that Nicaragua did not do this is *now* attributed by Nicaragua (in its Counter-Memorial, para. 91) to the double-edged argument that the King's powers as arbitrator "expired with the making of the award". It is not necessary for Honduras to travel down this inviting by-way because the fact remains that the award of the King of Spain is perfectly clear and capable of execution.<sup>496</sup>

317. In his oral argument made on 1 October 1960, the co-agent of the Government of Nicaragua, Mr. Chamorro, stated as follows:

The reality of this gap, hence, stands out as a demonstrated fact. The obscurities and contradictions in the Cape Gracias a Dios extreme of the boundary line and the gaps in the other extreme of the Teotecacinte sector have been clearly demonstrated, and the only thing that can be concluded from those facts is the incapability of the execution of the award.

How then can it be claimed that a decision is conclusive and complete when the frontier line which the arbitrator was called upon to establish in its entirety does not meet those conditions? That could be admissible, perhaps, if such obscurities, contradictions and gaps had occurred in a tiny section in the middle of the line. But as such defects occur at both ends of it, the execution on the spot stands incapable of accomplishment, because the clearly fixed part is isolated.

Honduras seems to consider these insurmountable difficulties in carrying out the so-called award as very easy to overcome, judging that such difficulties concern simply the problem of the execution on the spot of a line established clearly and in its entirety. But there is a great difference between the mere execution of a line

theoretically established in all its entirety, and a line not clearly and wholly established.<sup>497</sup>

318. On 7 October 1960, one of the counsel for the Government of Honduras, Mr. Guggenheim, in the course of his oral reply summarized that Government's position on the point in question as follows:

We recall that we have submitted *an explicit demand for execution*, the said obligation to execute resulting from the declaration by the Court of the binding nature of the award.

Nicaragua seeks, if we understand its second submission rightly, to have it admitted that the award, though valid, is incapable of execution because of the obscurities and omissions affecting its provisions.

It is quite evident, however, that the capability of execution of the award is a necessary corollary of its binding nature. The considerable international practice regarding the execution of boundary treaties or arbitral awards fixing a frontier establishes decisively that any technical difficulties that might arise are within the province of the demarcation commission and there can be no possible question of artificially separating the binding force of the validity of an award from its capability of execution.

Moreover, the obscurities and omissions alleged by Nicaragua, which do not, furthermore, in themselves constitute grounds for nullification recognized in international law, are in any event also covered by the explicit and tacit consent of Nicaragua.

The award is perfectly and entirely capable of execution in all its parts, as we have shown.

We ask the Court to declare that the second submission of Nicaragua is not admissible and must be dismissed.<sup>498</sup>

319. In his oral reply of 11 October 1960, one of the counsel for the Government of Nicaragua, Mr. Rolin, stated the following:

I know perfectly well, gentlemen, that obscurity in the provisions of a judicial and arbitral decision does not normally and necessarily lead to its nullification. But it does normally lead to requests for interpretation and results in impossibility of execution. This impossibility is temporary if the award can be interpreted by the body that made it. On the other hand, it is long-lasting when the body that made the award has disappeared, and it was in these circumstances that we felt we could legitimately assimilate this difficulty of execution to nullification.<sup>499</sup>

320. In its *Judgment of 18 November 1960*, the International Court of Justice, by 14 votes to one, found that the 1906 arbitral award was valid and binding and that Nicaragua was under an obligation to give effect to it. As to the contention that the award was not capable of execution by reason of its omissions, contradictions and obscurities, the Court stated the following:

It was further argued by Nicaragua that the award is not capable of execution by reason of its omissions, contradictions and obscurities, and that therefore on this ground the Court must reject the submission of Honduras praying that the Court should adjudge and declare that Nicaragua is under an obligation to give effect to the award.

The operative clause of the award fixes the common boundary point on the coast of the Atlantic as the mouth of the river Segovia or Coco where it flows out into the sea, taking as the mouth of the river that of its principal arm between Hara and the Island of San Pio where Cape Gracias a Dios is situated, and directs that, from that point, the frontier line will follow the thalweg of the river Segovia or Coco upstream without interruption until it reaches the

<sup>496</sup> *I.C.J. Pleadings, Case concerning the arbitral award made by the King of Spain on 23 December 1906*, vol. II, p. 201.

<sup>497</sup> *Ibid.*, p. 325.

<sup>498</sup> *Ibid.*, p. 426.

<sup>499</sup> *Ibid.*, p. 481.

place of its confluence with the Poteca or Bodega and that thence the frontier line will depart from the river Segovia or Coco continuing along the thalweg of the Poteca or Bodega upstream until it joins the river Guineo or Namaslí. From this junction, the line will follow the direction which corresponds to the demarcation of the *sitio* of Teotecacinte in accordance with the demarcation made in 1720 to terminate at the *portillo de Teotecacinte* in such a manner that the said *sitio* remains wholly within the jurisdiction of Nicaragua.

Nicaragua has argued that the mouth of a river is not a fixed point and cannot serve as a common boundary between two States, and that vital questions of navigation rights would be involved in accepting the mouth of the river as the boundary between Honduras and Nicaragua. The operative clause of the award, as already indicated, directs that "starting from the mouth of the Segovia or Coco the frontier line will follow the *vaguada* or thalweg of this river upstream". It is obvious that in this context the thalweg was contemplated in the award as constituting the boundary between the two States even at the "mouth of the river". In the opinion of the Court, the determination of the boundary in this section should give rise to no difficulty.

Nicaragua argues further that the delimitation in the operative clause leaves a gap of a few kilometres between the point of departure of the frontier line from the junction of the Poteca or Bodega with the Guineo or Namaslí up to the *portillo de Teotecacinte*, which was the point to which the Mixed Commission had brought the frontier line from its western boundary point. An examination of the award fails to reveal that there is in fact any gap with regard to the drawing of the frontier line between the junction of the

Poteca or Bodega with the Guineo or Namaslí and the *portillo de Teotecacinte*.

In view of the clear directive in the operative clause and the explanations in support of it in the award, the Court does not consider that the award is incapable of execution by reason of any omissions, contradictions or obscurities.<sup>500</sup>

321. Judge Sir Percy Spender, in a *separate opinion*, stated:

Finally, I agree that the contention of Nicaragua that the award, by reason of obscurities and contradictions alleged by it, is incapable of execution, is without substance. No reason appears which would prevent the award being carried into effect.<sup>501</sup>

322. Judge *ad hoc* Urrutia Holguin submitted a *dissenting opinion*, but stated the following with regard to the contention that the award was incapable of execution:

Nicaragua has asked the Court to find that, even if it was valid, the award was not capable of execution by reason of its omissions, contradictions and obscurities.

It is difficult to define which is the thalweg, the navigable arm or the principal mouth of rivers which, on land still in process of formation, often change their course. A court cannot give opinions on questions which only engineers or technicians can decide. Like the Court, I do "not consider that the award is incapable of execution", since it is for mixed commissions, or for any other authority to whom the parties might entrust the drawing of the boundary line, to settle problems which omissions, contradictions or obscurities in the award present.<sup>502</sup>

## SECTION 2. ARBITRATION

323. The texts concerning arbitration to which reference is made in this section refer either to "*force majeure*", "fortuitous event", "impossibility", or to the presence or absence of such elements as "fault", "wilfulness", "negligence", "due diligence", etc. As in the section dealing with State practice as reflected in diplomatic correspondence and other official papers, both kinds of text relate to situations of *force majeure* or fortuitous event or to factual situations which could eventually amount to circumstances of that kind. The various cases are presented chronologically.

324. It appears from the decisions recorded that *force majeure* and fortuitous event have been frequently recognized by arbitral tribunals and commissions, expressly or by implication, as circumstances precluding wrongfulness. Some arbitral awards and opinions also elaborate on the conditions to be fulfilled by these circumstances in order to be recognized as such in international law. It should be noted, however, that arbitral awards relate sometimes to the application or interpretation of régimes of responsibility established by treaty. Treaties frequently contain responsibility clauses such as, for example, the following paragraph of article XVIII of the Treaty of Friendship, Commerce and Navigation between Germany and Mexico, signed on 5 December 1882:

By agreement between the two parties, it is also stipulated that, except in cases where there has been any culpable negligence or

want of due diligence on the part of the Mexican authorities or of their agents, the German Government shall not hold the Government of Mexico responsible for such losses, damages or exactions as, in time of insurrection or civil war, German subjects may suffer on Mexican territory at the hands of insurgents, or from the acts of those tribes of Indians which have not yet submitted to the authority of the Government.<sup>503</sup>

The application and interpretation of treaty responsibility régimes is usually the task of certain arbitral tribunals or commissions such as those established pursuant to peace treaties. For instance, after the First World War, the French/German Mixed Arbitral Tribunal, constituted after the Treaty of Versailles, often concluded that Germany having acknowledged, under article 231 of that Treaty, the responsibility for the war, the German State could not take advantage of an exception of *force majeure* or of "fortuitous event"<sup>504</sup> due to the war,<sup>505</sup> where liti-

<sup>500</sup> *I.C.J. Reports*, 1960, pp. 216-217.

<sup>501</sup> *Ibid.*, p. 220.

<sup>502</sup> *Ibid.*, p. 235.

<sup>503</sup> *British and Foreign State Papers, 1881-1882* (London, Ridgway, 1889), vol. 73, p. 714. See also Treaty of Friendship, Commerce and Navigation between Germany and Colombia, signed on 23 July 1892 (*ibid.*, 1891-1892) (London, Harrison, 1898), vol. 84.

<sup>504</sup> See, for example, L. Cavaré, *Le droit international public positif*, 3rd ed. (Paris, Pedone, 1969), vol. II, pp. 472-473.

<sup>505</sup> See, for example, *Dame Franz v. German State and Hourcade v. German State* (1922) in *Recueil des décisions des tribunaux arbitraux mixtes* (Paris, Sirey, 1922), vol. I, pp. 781-788.



gation was incurred with nationals of Allied Powers.<sup>506</sup>

325. It should likewise be noted that the conclusions reached regarding specific cases by arbitral tribunals or commissions may depend also on the terms of the special agreement (*compromis*) establishing the tribunal or commission concerned or referring the case to it for arbitration. For instance, article 3 of the Protocol between Germany and Venezuela of 13 February 1903 provides that "the Venezuelan Government admits its liability in cases where the claim is for injury or a wrongful seizure of property and consequently the Commission will not have to decide the question of liability, but only whether the injury to or the seizure of property were wrongful acts and what amount of compensation is due".<sup>507</sup> While in some cases the special agreements state that the tribunal shall examine and decide the claims in accordance with the principles of international law and established international practices and jurisprudence,<sup>508</sup> in others it is said that the claims should be settled in accordance "with treaty rights and with the principles of international law and equity",<sup>509</sup> "with the principles of international law, justice and equity",<sup>510</sup> "with the principles of law and equity",<sup>511</sup> "with the principles of justice and equity",<sup>512</sup> "upon absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation",<sup>513</sup> etc.<sup>514</sup>

326. Finally, the documentation referred to relates exclusively to cases of arbitration "international" in

<sup>506</sup> See, for example, *Lorrain v. German State* (1923) (*ibid.*, 1924, vol. III, pp. 623–627). The Tribunal recognized, however, the exception of *force majeure* in certain cases relating to damages caused by revolutionaries in Germany. See for example, *Schleimer v. German State* and *Fonbank v. German State* (*ibid.*, 1926, vol. V, pp. 848 and 849, and *ibid.*, 1929, vol. VIII, pp. 489–491).

<sup>507</sup> United Nations, *Reports of International Arbitral Awards*, vol. X (United Nations publication, Sales No. 60.V.4), p. 359.

<sup>508</sup> See, for example, article 6 of the Convention between Chile and Great Britain of 4 January 1883 (H. La Fontaine, *Pasicrisie internationale* (Berne, Stämpfli, 1902), p. 243) and article 2 of the Special Agreement between Italy and Peru of 25 November 1889 (United Nations, *Reports of International Arbitral Awards*, vol. XV (United Nations publication, Sales No. 66.V.3.), p. 393).

<sup>509</sup> For example, in article 7 of the Special Agreement between the United Kingdom and the United States of America of 18 August 1910 (*ibid.*, vol. VI (Sales No. 1955.V.3), p. 10).

<sup>510</sup> Article II of the General Claims Convention between Mexico and the United States of America of 8 September 1923 (*ibid.*, vol. IV (Sales No. 1951.V.1), p. 12).

<sup>511</sup> See, for instance, article 1 of the Special Agreement between Norway and the United States of America of 30 June 1921 (Norwegian Shipowners' Claims) (*ibid.*, vol. I (Sales No. 1948.V.2), p. 310).

<sup>512</sup> See, for instance, article 2 of the Convention between Mexico and the United Kingdom of 19 November 1926 (*ibid.*, vol. V (Sales No. 1952.V.3), p. 81).

<sup>513</sup> Article I of the Protocol between the United States of America and Venezuela of 17 February 1903 establishing the United States/Venezuela Mixed Claims Commission (J. H. Ralston, *Venezuela Arbitrations of 1903* (Washington, D.C., U.S. Government Printing Office, 1904), p. 2).

<sup>514</sup> On the interpretation of equity clauses inserted in special agreements by international courts or arbitral tribunals, see C. de Visscher, *De l'équité dans le règlement arbitral ou judiciaire des litiges de droit international public* (Paris, Pedone, 1972).

character both from the standpoint of the parties to the dispute and from the nature of the arbitral tribunal or commission concerned. Decisions of national arbitral bodies<sup>515</sup> or concerning arbitration in private law matters<sup>516</sup> are not included.

#### THE "JAMAICA" CASE (*Great Britain/United States of America*) (1798)

327. The *Jamaica*, a British merchant vessel, was captured on the high seas by a vessel originally armed in a port of the United States of America. The vessel and its cargo were burnt and totally destroyed on the high seas. The British/United States Mixed Commission, established under article 7 of the Treaty of 19 November 1794, decided in its award of 21 May 1798 that the owners of the vessel and the cargoes were not entitled to compensation from the United States. In the opinion of one of the Commissioners, Mr. Gore, the basis for an obligation on the part of the United States to compensate in this case would be the forbearance on its part to "use the means in its power" to restore such captured property when brought within its jurisdiction. Because there was not the smallest evidence to induce a belief that the Government of the United States permitted or in any degree connived at the arming of the vessel or "failed to use all the means in its power" to prevent the equipment of the vessel in its ports, there was no ground to support the charge.<sup>517</sup> Commissioner Gore concluded that "where there is no fault, no omission of duty, there can be nothing whereon to support a charge of responsibility or justify a complaint".<sup>518</sup>

<sup>515</sup> For instance, the Mixed Commission constituted to deal with claims arising out of the 1909–1910 civil war in Nicaragua was appointed by the Nicaraguan Government (see *American Journal of International Law* (New York), vol. 9, No. 4 (October 1915), pp. 858–869).

<sup>516</sup> For example, commercial arbitration matters. For an interesting case of commercial arbitration involving the interpretation of a *force majeure* clause included in a contract, see the award dated 19 June 1958 made by the Foreign Trade Arbitration Commission of the USSR in the case *Jordan Investments Ltd. v. Sojuzneftexport* (*American Journal of International Law* (Washington, D.C.), vol. 53, No. 4 (October 1959), pp. 800–806). For a comment on award, see H. J. Berman, *Force majeure* and the denial of an export license under Soviet law ..., *Harvard Law Review* (St. Paul, Minn.), vol. 73, No. 6 (April 1960), pp. 1128–1146.

<sup>517</sup> J. B. Moore, *International Adjudications*, Modern Series (New York, Oxford University Press, 1931), vol. IV, p. 499.

<sup>518</sup> *Ibid.* Gore quoted the following argument, found in the memorial of the King of England of 21 February 1777, which the British counsel in the present case introduced to support his contention:

"... it is well known that the vigilance of the laws cannot always prevent artful, illicit traders, who appear under a thousand different forms, and whose avidity for gains makes them brave every danger and elude every precaution. ... In the vast and extended theatre of a naval war, the most active vigilance and the most steady authority are unable to discover or suppress every disorder..." (*ibid.*).

THE "ENTERPRISE" CASE (*United Kingdom/United States of America*) (1853)

328. In 1835, an American brig *Enterprise*, encountering head winds and gales and finding its provisions running short, entered the harbour of Hamilton on Bermuda Island, a British colony. On board were slaves destined for South Carolina, who were subsequently set free by the British authorities, as slavery had been abolished in Bermuda. The United States, in asking for compensation, contended, *inter alia*, that, given the circumstances in which the *Enterprise* came into Bermuda, the local British authorities could not have boarded the vessel legally and that it was United States law that was applicable on board. The case was submitted to the arbitration of a mixed commission, pursuant to the Convention between the United Kingdom and the United States of America of 8 February 1853.

329. The American and British Commissioners, in their respective opinions discussed the question of the legal rules applying to a vessel seeking refuge, owing to the stress or necessity of weather or other conditions, in a harbour under foreign jurisdiction. Mr. Upham, the American Commissioner, expressed the following views:

II. ... a vessel impelled by stress of weather, or other unavoidable necessity, has a right to seek shelter in any harbor, *as incident to right to navigate the ocean*, until the danger is past and can proceed again in safety.

This position I propose to sustain on three grounds: By authority; by the concession of the British Government in similar cases; and by its evident necessity as parcel of the free right to navigate the ocean, and therefore a necessary incident of such right.

1. The effect of stress of weather in exempting vessels from liabilities to local law, when they are driven by it within the ordinary jurisdiction of another country, is well settled by authority in various classes of cases, viz., in reference to the blockade of harbors and coasts; of prohibited intercourse of vessels between certain ports that are subject to quarantine regulations; intercourse between certain countries, or sections of countries, which is interdicted from motives of mercantile policy, and in cases of liability to general Customs duties.

...  
A further reason assigned for the point now under consideration is its evident necessity as a part of the free right of each nation to navigate the ocean, and as a necessary incident of such right.

Writers on public law, we have seen, assert a right to enter a foreign port, when driven there by stress of weather, on the ground of necessity. This necessity arises from perils of the deep, to which all navigation on the ocean is subject; and if such perils from this cause give the right of refuge, it becomes necessarily what I claim for it—an incidental right to the navigation of the ocean.

It is a necessity essential to the enjoyment of a clear and undeniable right; and whatever is essential to the enjoyment of a right, or is a necessary means of its use, is, *ex vi termini*, a necessary incident of such right.

...

I now come to the third proposition.

III. That as the right of shelter, by a vessel, from storm and inevitable accident, is incident to her right to navigate the ocean, it necessarily carries with it her rights on the ocean, so far as to retain over the vessel, cargo, and persons on board the jurisdiction of the laws of her country.

...  
The entrance of a vessel into a foreign harbor, when compelled by stress of weather, is a matter of right. She goes there on a highway which, for the time being, is her own. She is, as when on the ocean, part and parcel of the Government of her own country, temporarily forced, by causes beyond her control, within a foreign jurisdiction. Her presence there under such circumstances need not excite any more feeling than when on the ocean. It is a part of her voyage, temporarily interrupted by the vicissitudes of the sea, but carrying with it the protection of the sea, and the property and relations of the persons on board can not, in such case, be interfered with by the local law, so as to obstruct her voyage or change such relations, so long as they do not conflict with the law of nations.<sup>519</sup>

330. The British Commissioner, Mr. Hornby, on the other hand, disagreed with the American contention, as follows:

This explanation of the law of nations shows that when a vessel is in a foreign port under such circumstances as entitle it to exemption from the application of the local law, the exemption can not be put on the same ground as the immunity from interference of a vessel on the high seas, for there in time of peace it is absolute. There is no right on the part of a foreign court even to inquire into the legality of anything occurring in the vessel of another country while at sea; but within the territories of a country the local tribunals are paramount, and have the right to summon all within the limits of their jurisdiction, and to inquire into the legality of their acts and determine upon them according to the law which may be applicable to the particular case. It appears to me, therefore, that it can not with correctness be said "that a vessel forced by stress of weather into a friendly port is under the exclusive jurisdiction of the State to which she belongs in the same way as if she were at sea." She has been brought within another jurisdiction against her will, it is true, but equally against the will and without fault on the part of the foreign Power; she brings with her (by the law of nations) immunity from the operation of the local laws for some purposes, but not for all, and the extent of that immunity is the proper subject of investigation and adjudication by the local tribunals.

...  
One ground, if indeed it be not the chief ground, upon which this claim has been rested is that the *Enterprise* was compelled by necessity to put into the port of Bermuda, and that on this account the owners of the slaves were entitled to claim exemption from the operation of English law. I do not think, however, that any such case of necessity has been made out as would give rise to the exemption contended for, if under any circumstances it could arise. It is not pretended that the *Enterprise* was forced by storm into Bermuda. All that is asserted is that her provisions ran short by reason of her having been driven out of her course. No case of pressing, overwhelming need is shown to have existed; but, to avoid the inconvenience of short rations (and, considering the nature of the cargo, it was an inconvenience which a very slight delay was likely to occasion), the master put into an English harbor to procure supplies. These facts do not certainly disclose that paramount case of necessity which has been insisted on throughout the argument, and which alone (if any circumstances could give rise to the exemption upon which this claim is supported) could form the basis of such an appeal as the present. If a mere scarcity of provisions, which might arise from so many causes, is to be considered not only as a sufficient excuse for the entrance of a vessel into a British port with a prohibited cargo but is also to entitle it to an exemption from the operation of the English law, it is impossible

<sup>519</sup> J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, D.C., U.S. Government Printing Office, 1898), vol. IV, pp. 4354-4355, 4357 and 4359.

to say to what the admission of such a principle might lead, or what frauds on the part of slave speculators it might induce.<sup>520</sup>

331. In his opinion of 15 January 1855, the Umpire, Mr. Bates, decided as follows:

This is believed to be a faithful sketch of the case, from which it appears that the American brig *Enterprise* was bound on a voyage from one port in the United States to another port of the same country, which was lawful according to the laws of her country and the law of nations. She entered the port of Hamilton in distress for provisions and water. No offence was permitted against the municipal laws of Great Britain or its colonies, and there was no attempt to land or to establish slavery in Bermuda in violation of the laws.

It was well known that slavery had been conditionally abolished in nearly all the British dominions about six months before, and that the owners of slaves had received compensation, and that six years' apprenticeship was to precede the complete emancipation, during which time apprentices were to be bought and sold as property, and were to be liable to attachment for debt.

No one can deny that slavery is contrary to the principles of justice and humanity, and can only be established in any country by law. At the time of the transaction on which this claim is founded, slavery existed by law in several countries, and was not wholly abolished in the British dominions. It could not, then, be contrary to the law of nations, and the *Enterprise* was as much entitled to protection as though her cargo consisted of any other description of property. The conduct of the authorities at Bermuda was a violation of the laws of nations, and of those laws of hospitality which should prompt every nation to afford protection and succour to the vessels of a friendly neighbour that may enter their ports in distress.

The owners of the slaves on board the *Enterprise* are therefore entitled to compensation, and I award to the Augusta Insurance and Banking Company or their legal representatives the sum of sixteen thousand dollars, and to the Charleston Marine Insurance Company, or their legal representatives, the sum of thirty-three thousand dollars, on the fifteenth of January 1855.<sup>521</sup>

#### THE WEBSTER CASE (*Mexico/United States of America*) (1868)

332. On 7 January 1866, the town of Tehuantepec was attacked by Mexican troops under the republican army. An American citizen, Mr. Webster, and other foreigners took refuge in a house owned by a British citizen which had been used by the American Consul and which had the American flag raised over it at the time. The house was attacked and Webster was severely wounded. He died subsequently. The case was referred to the Mexican/United States Commission established under the Convention of 4 July 1868. The Umpire, Mr. Thornton, awarded a sum for the administrator of Webster, saying:

It is stated by some of the witnesses that the house ... was invaded and occupied for the purpose of flanking the enemy. This

<sup>520</sup> *Ibid.*, pp. 4364–4365 and 4371.

<sup>521</sup> *Ibid.*, p. 4373. The Umpire followed essentially the same ciple in two other cases which were before the Mixed Commission: those of the *Hermosa* and the *Creole* (*Ibid.*, pp. 4374–4378). In the latter case, the Umpire stated as follows:

"These rights, sanctioned by the law of nations—viz., the right to navigate the ocean and to seek shelter in case of distress or other unavoidable circumstances, and to retain over the ship, her cargo and passengers the laws of her own country—must be respected by all nations, for no independent nation would submit to their violation" (*ibid.*, p. 4378).

may have been a necessity of war, but the wounding of Webster was not so. If the house was broken into merely for the sake of plundering, the act of wounding Webster was a wanton outrage, but was countenanced by an officer, so that the Government became liable for it.<sup>522</sup>

#### THE "MERMAID" CASE (*United Kingdom/Spain*) (1869)

333. On 16 October 1864, an English schooner, the *Mermaid*, was navigating through the Gibraltar strait, when a storm forced her toward the African coast, near the Spanish fort of Ceuta. The vessel received a cannon warning and the captain gave the order to raise the flag. However, whether because the order was not executed promptly enough, or because the Spanish authorities were not able to recognize the flag owing to the position of the vessel, it received a second shot from the cannon. The *Mermaid* then began to sail away from the shore and soon after that the vessel sank. The British Government, imputing the loss of the *Mermaid* to the negligence of the authorities of Ceuta, demanded of the Spanish Government an indemnity. The latter Government refused and held the captain of the *Mermaid* responsible. The case was referred to a Mixed Commission set up by the United Kingdom and Spain under the Convention of 4 March 1868. In its decision of 28 February 1869, the Mixed Commission concluded that the Spanish Government was responsible, arguing:

... the *Mermaid*, when passing before the fort of Ceuta, had hoisted its colours after the first shot; the Spanish authorities, deceived no doubt by the vessel's position, which prevented them from seeing the flag full on, saw fit to continue the fire; although it had not been the target, the vessel, at the second shot, was hit on the starboard side forward, a little below the water line; the captain, not at once realizing the extent of the damage, thought he could withdraw from the coast, and the vessel sank out at sea. What was involved was a clumsily directed shot, the consequences of which Spain should bear by compensating the victims of the accident.<sup>523</sup>

#### THE "ALABAMA" CASE (*United Kingdom/United States of America*) (1872)

334. During the American Civil War United States sea-borne commerce suffered great damage due to the depredations of the *Alabama* and other Confederate cruisers fitted out under British jurisdiction. The vessel, known originally as "No. 290", was constructed in Liverpool for Confederate agents and, despite the repeated warning given as to its character and ownership by the American Ambassador, it left England, unarmed, for the Azores, where it was joined by the *Agrippina*, which had sailed from London with cannon, munitions, coal and other naval equipment. After the arrival of a Confederate navy

<sup>522</sup> *Ibid.*, vol. III, p. 3004.

<sup>523</sup> A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux* (Paris, Les Editions internationales, 1932), vol. II, p. 496.

captain, the cruiser, now fully armed and changing its name to *Alabama*, embarked on its hostile activities, capturing or destroying a number of American vessels before being destroyed by a Federal cruiser in June 1864. After the Civil War, the United States resumed its efforts to secure compensation from the United Kingdom for the damage done by the *Alabama* and other similar Confederate cruisers. The British Government denied its responsibility, arguing *inter alia* that it had acted with due diligence, or in good faith and honestly, in the maintenance of the neutrality it had proclaimed.<sup>524</sup> On 8 May 1871, the two Governments signed the Treaty of Washington, by which they agreed to submit the claim to arbitration. The Treaty provided in its article 6 that in deciding the matters submitted to them, the arbitrators should be governed by three rules<sup>525</sup> agreed upon by the parties as rules to be taken as applicable to the case and by such principles of international law not inconsistent therewith as the arbitrators should determine to have been applicable to the case.

335. In the award of 14 September 1872, the arbitrators concluded that Great Britain had failed, by omission, to fulfil the duties prescribed in the first and the third of the rules established by article 6 of the Treaty of Washington. Four of the five arbitrators based this conclusion, *inter alia*, on the following grounds:

... the "due diligence" referred to in the first and third of the said rules ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part;

... the effects of a violation of neutrality committed by means of the construction, equipment, and armament of a vessel are not done away with by any commission which the Government of the belligerent Power, benefited by the violation of neutrality, may afterwards have granted to that vessel; and the ultimate step, by which the offence is completed, cannot be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence;

... with respect to the vessel called the *Alabama*, it clearly results from all the facts relative to the construction of the ship at first designated by the number "290" in the port of Liverpool, and its equipment and armament in the vicinity of Terceira through the agency of the vessels called the *Agrippina* and the *Bahama*, dispatched from Great Britain to that end, that the British Government failed to use due diligence in the performance of its neutral obligations; and especially that it omitted, notwithstanding the warnings and official representations made by the diplomatic agents of the United States during the construction of the said number "290", to take in due time any effective measures of prevention, and that those orders which it did give at last, for the detention of the vessel, were issued so late that their execution was not practicable;

... And whereas, after the escape of that vessel, the measures taken for its pursuit and arrest were so imperfect as to lead to no

result, and therefore cannot be considered sufficient to release Great Britain from the responsibility already incurred;

... in despite of the violations of the neutrality of Great Britain committed by the "290", this same vessel, later known as the Confederate cruiser *Alabama*, was on several occasions freely admitted into the ports of colonies of Great Britain, instead of being proceeded against as it ought to have been in any and every port within British jurisdiction in which it might have been found;

And ... the Government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed: ...<sup>526</sup>

#### THE SAINT ALBANS RAID CASE (*United Kingdom/United States of America*) (1873)

336. On 19 October 1864, more than twenty persons who had entered the United States from Canada and had been assembled in Saint Albans, Vermont, raided that village, killing one person, destroying property, stealing money and other objects, etc. These acts were committed under arms and with military uniform, equipment and organization. It was alleged that the party acted under the command of a lieutenant in the army of the Confederate States and that all its members were connected with the regular military services of the Confederates. After the raid, they retreated in a body towards Canada, and entered that country carrying with them the plundered property. Several claimants charged in their memorials that the British Government and the authorities in Canada had been "culpably negligent". The case was submitted to arbitration under the Treaty of 8 May 1871.

337. The United States counsel maintained that the Government of Canada, which was held to "due diligence" to prevent military operations by enemies of the United States using the soil of Canada as a base of operations against the United States, had entirely failed in the performance of its international duties, and that by reason of such failure the British Government was liable to the United States for the injuries inflicted by the raiders. He stated also that the measure of that diligence was to be determined by a series of considerations, such as the nature of the danger to be apprehended from the neutral territory, the magnitude of the danger and the results of negligence, the means of the United States to resist or prevent it, the sympathy and aid which the enemies of the United States might receive in Canada, the unfriendliness of the people of Canada to the United States, the fact of plans for former raids being known to the Government of Canada, and the hostile speeches and avowed intentions of the enemies of the United States in Canada.<sup>527</sup>

338. On the other hand, the British Government's counsel argued, *inter alia*, that the proof in the case showed no state of facts importing any lack of care or diligence on the part of the authorities of Canada; that, since the raiding party entered the United

<sup>524</sup> J. B. Moore, *History and Digest ... (op. cit.)*, 1898, vol. I, p. 496.

<sup>525</sup> See foot-note 229 above.

<sup>526</sup> Moore, *History and Digest ... (op. cit.)*, vol. I, pp. 654-656,

<sup>527</sup> *Ibid.*, vol. IV, p. 4051.

States individually or in small parties in the manner of ordinary travellers there was nothing in their appearance or movements to excite suspicion; that in fact the proof failed to show that the raid was organized in Canada; that the raiders procured arms or ammunition there, or did any other act within Her Majesty's dominions in violation of her just neutrality which was known to, or with due diligence might have been known to, the Canadian authorities.<sup>528</sup>

339. The Commission rejected all the United States claims. The majority of the Commission concurred on the following reasoning of Commissioner Frazer:

The raid upon Saint Albans was by a small body of men, who entered that place from Canada without anything to indicate a hostile purpose. ... That there was a preconcerted hostile purpose is unquestionable, but this was so quietly formed, as it could easily be, that even at this day the evidence does not disclose the place, the time, nor the manner. ... Such was the secrecy with which this particular affair was planned that I can not say it escaped the knowledge of Her Majesty's officers in Canada because of any want of diligence on their part which may possibly have existed. I think rather it was because no care which one nation may reasonably require of another in such cases would have been sufficient to discover it. At least the evidence does not satisfy me otherwise.<sup>529</sup>

#### THE SHATTUCK CASE (*Mexico/United States of America*) (1874-1876)

340. The American claimants in this case, D. Shattuck and P. Shattuck, alleged that their farm and crops had suffered damage when Mexican soldiers passed through it. The claim was referred to the Mexico/United States Mixed Commission established under the Convention of 4 July 1868. The umpire, Mr. Thornton, said the claim against the Mexican Government could not be justified. He thought the damages were caused as a result of the inevitable accidents of a state of war rather than a wanton destruction of property by the Mexican authorities. It appeared that both French and Mexican troops were on the spot at different times and a Mexican army was encamped close to it for some time. The umpire concluded that in such circumstances it would have been next to impossible for the commander-in-chief of any army to prevent encroachments upon private property, a misfortune to which natives were exposed as much as foreigners, with the additional disadvantage that the former were generally forced to serve in the armed forces.<sup>530</sup>

<sup>528</sup> *Ibid.*, pp. 4052-4053.

<sup>529</sup> *Ibid.*, p. 4054.

<sup>530</sup> *Ibid.*, p. 3668. In the Blumenkron case, involving damage done by Mexican troops to the residence of an American citizen in Mexico, the same umpire said:

"The city was held by a foreign enemy and was besieged by native troops. Under these circumstances and during the actual carrying on of hostilities the umpire does not consider that the property of a foreigner residing in the besieged city, more particularly when it is real property, can be looked upon as more sacred than that of natives. It is not shown, nor has the umpire any reason to believe, that any indemnity was granted to native

#### THE PRATS CASE (*Mexico/United States of America*) (1874)

341. During the American Civil War, in 1862, a British brig, the *M. A. Stevens*, was burned together with its cargo at Baratavia, which was under United States authority, by a naval force belonging to, and acting under the authority of, the rebelling Confederate States. The cargo belonged to a commercial company in New Orleans partly owned by Salvador Prats, a Mexican citizen, and was bound for Havana. Prats brought a claim against the United States of America for the value of the cargo. The case was referred to the Mexico/United States Mixed Commission established under the Convention of 4 July 1868. Both the Mexican and United States Commissioners concurred in dismissing the case. In the opinion of Mr. Wadsworth, the United States Commissioner,

If we admit for the moment that, under the Convention, the United States is liable for neglect of a duty stipulated by treaty or imposed by the law of nations, and if such a duty in the present instance be postulated, it would be difficult to show such neglect, in view of the history of the late Civil War, and particularly of the capture of New Orleans. But no such duty, in fact, rested on the [Government of the] United States after the commencement of the war. That Government was under no obligation, by treaty or the law of nations, to protect the property of aliens situated inside the enemy country against the enemy. The international duty of the United States or its engagements by treaty to extend protection to aliens, transient or dwelling, in its territories, ceased inside the territory held by the insurgents from the time such territory was withdrawn by war from the control of that Government, and until its authority and jurisdiction were again established over it.

The principle of non-responsibility for acts of rebel enemies in time of civil war rests upon the ground that the latter have withdrawn themselves by force of arms from the control and jurisdiction of the sovereign, putting it out of his power, so long as they make their resistance effectual, to extend his protection within the hostile territory to either strangers or his own subjects, between whom, in this respect, no inequality of rights can justly be asserted.

...

Aliens residing and trading inside the rebel territory acted at their peril. Indeed, the fact of residence and trade constituted them enemies of the United States, in common with the rest of the inhabitants whose "spirit and industry" contributed to the resources of the enemy. The house of Prats, Pujol and Co., conducting business in New Orleans in 1862, was engaged in commerce injurious to the United States. Shipping cotton by that house to Havana from New Orleans, while the latter port was held by the enemy, whether blockaded or not, subjected the property to capture on the high seas as prize of war. The fact that one of the house was an alien, even if domiciled in Campeachy, would not exempt his share.

We are at a loss, therefore, to perceive on what ground aliens resident in the hostile territory could claim the protection of a Power lawfully exercising the rights of war against that territory and all its inhabitants.

Mexicans on account of similar damage; neither can the Mexican Government be expected to compensate foreigners for damage done to their real property by reason of actual hostilities for the purpose of delivering the country from a foreign enemy. Those who prefer to take up their residence in a foreign country must accept the disadvantages of that country with its advantages, whatever they may be." (*Ibid.*, p. 3669.)

It is certain, if the forces of the United States, in the course of their operations to reduce the forts of the enemy below New Orleans and to capture the city, had destroyed the vessel and cotton, [the] Government [of the United States] would not thereby have incurred any responsibility to the claimant's Government.

...

If ... persons residing within the arena of the struggle have no right to demand compensation from either of the belligerents, much less can such persons rightly demand indemnity from one belligerent for losses inflicted by the other.

...

We are not aware of an instance where such claims have ever been conceded by any nation able to protect itself, or at liberty to refuse such unjust demands.

The non-responsibility of the United States for the acts of its late rebel enemies, while forcibly withdrawn from the jurisdiction of [the] Government [of the United States], must have been generally conceded by other nations; for, although many citizens of American and European States were resident in the hostile territory during the struggle, and suffered losses common to all inhabitants of the arena of war, no nation has made a demand upon the United States for indemnity (unless the present case forms the exception), while it is certain that that Government would promptly repel all such demands.<sup>531</sup>

The Mexican Commissioner, Mr. Palacio, expressed himself as follows:

...

It being thus ascertained that the duty of protection on the part of the Government, either by the general principles of international law or by the special agreements of the treaties, only goes as far as permitted by possibility, the following question arises: what is the degree of diligence required for the due performance of this duty? And the answer will be very obvious: that diligence must be such as to render impossible any other, better or more careful and attentive [performance], so as not to omit anything, practical or possible, which ought to have been done in the case. Possibility is, indeed, the last limit of all the human obligations; the most stringent and inviolable ones can not be extended to more. [To exceed] this limit would be equivalent to [attempting] an impossibility, and so the jurists and law writers, in establishing the maxim *ad impossibile nemo tenetur*, have merely been the interpreters of common sense.

The same truth will be expressed in a more practical language by saying that the extent of the duties is to be commensurate with the extent of the means for performing [them] and that he who has employed all the means within his reach has perfectly fulfilled his duty, irrespective of the material result of his efforts. To ask of him some other thing would be the same as to [demand] an action *ultra posse*, which is positively an absurdity.

...

Under such a state of things [state of war], it is not in the power of the nation to prevent or to avoid the injuries caused or intended to be caused by the rebels, either to the foreign residents or to the native citizens of the country, and as nobody can be bound to do the impossible, from that very moment the responsibility ceases to exist. There is no responsibility without fault (*culpa*) and it is too well known that there is no fault (*culpa*) in having failed to do what was impossible. The fault is essentially dependent upon the will, but as the will completely disappears before the force, whose action can not be resisted, it is a self-evident result that all the acts done by such force, without the possibility of being resisted by another equal or more powerful force, can neither involve a fault nor an injury nor a responsibility.

[These is nothing] strange [in speaking] of violence (*vis major*) when the question is of nations, and even of very powerful ones. It is not impossible that ... nations, although perfectly able to

obtain at last an easy and final victory over their enemies, on account of their overwhelming superiority, should not display the same resources in all the acts of the war, and always and everywhere provide, at the opportune moment, what was required to prevent the injury.

Nobody has thus far believed that the duty of Governments was to indemnify their citizens for the losses and injuries sustained by cause of war; and it is not easy to perceive the reason why an alien might be entitled to claim what is refused to the citizen. Nations can and must afford protection, and prevent and punish the offences by all the means they have within their reach; but none has had the temerity to maintain as a principle of public law the duty of indemnifying for losses and injuries caused by *the enemy*.<sup>532</sup>

#### THE JEANNOTAT CASE (*Mexico/United States of America*) (1875)

342. During a revolution in Mexico, a force detached from the army under General Díaz Salgado, accompanied and commanded by officers, entered Mineral de la Luz, released the convicts from the prison and in concert with them sacked the town, including the store of the claimant, Jeannotat, a United States citizen. General Díaz Salgado was one of the supporters of the revolution under the Plan of Ayutla, which led to the establishment of a new Government in Mexico. The claim was referred to the Mexico/United States Mixed Commission established under the Convention of 4 July 1868. In his decision of 9 April 1875, the umpire, Mr. Thornton, concluded that compensation was due to the claimant from the new Mexican Government.

343. The umpire considered that at the time of the events that new Government was the *de facto* Government of the Republic and when, afterwards, it became the *de jure* Government, General Díaz Salgado was an official in that Government. He admitted that revolutions were frequently accompanied by unavoidable evils and that for such evils a Government founded upon a revolution of that nature could hardly be held responsible, but in his opinion responsibility must be accepted when, as in the sacking of Mineral de la Luz, the mischief was "unnecessary and wanton" and the military force was commanded by officers "who put it in the power of the convicts and incited the mob to assist them in their acts of violence and plunder".<sup>533</sup>

#### THE "MONTIJO" CASE (*Colombia/United States of America*) (1875)

344. The *Montijo*, a steamer registered in New York and owned by Messrs. Schuber Brothers, citizens of the United States of America, was engaged in the trade between the city of Panama and the town of David and intermediate ports during the period between 1869 and 1871 under a contract with the Government of Panama (a member of the

<sup>531</sup> *Ibid.*, vol. III, pp. 2889-2891.

<sup>532</sup> *Ibid.*, pp. 2893-2895.

<sup>533</sup> *Ibid.*, vol. IV, p. 3674.

Colombian Union), by which it enjoyed certain privileges. In return for the privileges, the owners of the *Montijo* pledged to carry the official correspondence of the State gratuitously and to give passage at reduced rates to government troops and officials. It was also stipulated that, in cases of disturbance of public order, special contracts should be made for the conveyance of troops. In early April 1871, when the *Montijo* was lying in the port of David, Tomas Herrera and other persons, who were planning a revolution against the Panamanian Government, endeavoured to obtain by negotiation the services of the vessel from one of her owners. The proposal was rejected and on 6 April the vessel was taken forcibly by Herrera and others. The vessel remained in possession of its captors, and later of the Panamanian Government, for a certain period of time. Subsequently, a treaty of peace was concluded between the President of Panama and Herrera, chief of the revolutionary forces, by which a complete amnesty was reciprocally granted and by which the Government assumed "the expense of the steamers and other vehicles which the revolution has had to make use of" up to the date of the treaty. Since nothing had been paid by Panama for the use of the steamer *Montijo*, the Government of the United States brought a claim against the Government of Colombia under the Convention between the two Governments of 17 August 1874.

345. The arbitrators from Colombia and the United States having been unable to arrive at a common decision, the claim was referred to an umpire. The umpire decided on 26 July 1875 that the Colombian Union was responsible, for two reasons, First, he said, Colombia was the "natural heir of the liabilities" of Panama towards the owners of the *Montijo*, Panama being liable because it had absolved the responsibility of Herrera and others by the treaty of peace and its accompanying amnesty, and had assumed under that treaty the obligation to pay for the use of the vessel. Secondly, in his opinion, the Government of the Colombian Union:

... through its officers in Panama, failed in its duty to extend to citizens of the United States the protection which, both by the law of nations and by special treaty stipulation, it was bound to afford. It was ... the clear duty of the President of Panama, acting as the constitutional agent of the Government of the Union, to recover the *Montijo* from the revolutionists and return her to her owner. It is true that he had not the means of doing so, there being at hand no naval or military force of Colombia sufficient for such a purpose; but this absence of power does not remove the obligation ... If it promises protection to those whom it consents to admit into its territory, it must find the means of making it effective. If it does not do so, even if by no fault of its own, it must make the only amends in its power, viz., compensate the sufferer.<sup>534</sup>

#### THE "MARIA LUZ" (*Japan/Peru*) (1875)

346. In May 1872, the Peruvian bark *María Luz* left the Portuguese colony of Macao for Peru with 225

Chinese labourers on board. During its voyage, it put into the port of Kanagawa in Japan under stress of weather. On 13 July, a labourer from the vessel was found near the British warship, *Iron Duke*. He requested the protection of the British authorities and was handed over to the British Consul, who then delivered him to the Japanese authorities. The Japanese authorities returned the labourer to the *María Luz*, but since similar cases followed, the British Chargé d'affaires made a visit to the vessel to inspect the situation. After he had seen evidence of ill-treatment of the Chinese on the vessel, he brought this to the notice of the Japanese Government, asking that an investigation be made. The Japanese authorities summoned some of the Chinese to appear as witnesses, who refused, however, to return to the vessel after the investigation. The master of the vessel then demanded the return of the Chinese. This being refused, he brought suit, at the suggestion of the Japanese authorities, in a Japanese court. The court refused to decree specific performance of the contracts by which the master would be entitled to take the Chinese to Peru. The court argued that the contracts in question were null because, *inter alia*, they were against public order in Japan, which did not permit any labourer to be taken out of its territory against his free will, and also as they were contrary to *bonos mores* because they created personal servitude on the part of the labourers.

347. The Peruvian Government, supporting the protest made by the master of the *María Luz* against the judgment, came to an agreement with the Japanese Government to refer the case to arbitration by the Emperor of Russia under the Protocol of 25 June 1873. Holding that the Japanese Government was not responsible, the award of 17 (29) May 1875 stated:

We have reached the conclusion that the Government, in acting as it did with regard to the *María Luz*, its crew and passengers, acted in good faith and in accordance with its own law and customs, without violating the rules of international law in general or the provisions of any treaty in particular.

Consequently, it cannot be accused of any voluntary lack of respect or of any ill will towards the Peruvian Government or Peruvian nationals ...<sup>535</sup>

#### THE GILES CASE (*France/United States of America*) (the 1880s)

348. William Giles, an American citizen, owned a factory situated at Pantin, between the walls and the

<sup>535</sup> Lapradelle and Politis, *op. cit.*, 1954, vol. III, p. 589. In its pleading, the Peruvian Government charged the Japanese Government with a denial of justice based on the irregularity of the decision of the Japanese authorities, and concluded:

"The responsibility for all these acts devolves upon the Japanese Government, which, having initiated an arbitrary diplomatic procedure in order to commence legal proceedings, the conclusions of which had its full approval, was responsible for the detention and finally the abandonment of the *María Luz*, involving heavy loss to the owners and the charter parties." (*Ibid.*, p. 586.)

<sup>534</sup> La Fontaine, *op. cit.*, p. 219.



outer fortifications of the city of Paris. In 1870, during the siege of Paris by the Germans, the factory was destroyed and Giles claimed compensation from the French Government. It appeared that during the siege the property of Giles was damaged and portions of it taken by the National Guard and marauders. Following this partial destruction of the property, an order was given by General Trochu for the evacuation of what was called the "zone militaire", in which the factory of Giles was situated. Two days afterwards, it was reported that the buildings in the "zone militaire" had been destroyed by fire. The case was referred to the Commission established by the Convention of 15 January 1880. The French counsel argued that Giles's buildings were outside the zone and that they were not destroyed by the order, according to the report of the chief of the engineers. He further stated that, if they were actually destroyed, it was by the unauthorized acts of soldiers and marauders, and that no authority for such action had been given by any civil or military officer of the French Government. He then concluded that the French Government was not responsible for the damage suffered by the property of Giles. The Commission rejected the claim of Giles by a majority. Dissenting from the majority, the United States Commissioner stated that he agreed as far as the damage done by the marauders was concerned, but claims for the portion of the damage done by the National Guard should have been allowed.<sup>536</sup>

THE WIPPERMAN CASE (*United States of America/ Venezuela*) (1889 and onwards)

349. The case arose as a result of the loss of property of Mr. Wipperman, a United States consul in Venezuela, occasioned by the pillage within Venezuelan territory by Indians in 1862 of a stranded boat carrying Mr. Wipperman and his property back to the United States. The case was referred to the United States/Venezuela Claims Commission under the Convention of 5 December 1885 (case No. 22). The United States Government claimed an indemnity, viewing the incident as an outrage permitted by the Government of Venezuela for the want of those necessary and indispensable precautions which the laws of nations require for the protection of aliens domiciled within a foreign jurisdiction, and especially consuls.

350. On behalf of the Commission, Commissioner Findlay rejected the claim. He referred in his opinion to accidental injury, sudden and unexpected deeds of violence, and reasonable foresight as follows:

... there can be no possible parallel between the case of a consul residing in a large city inhabited by civilized people, whose house is deliberately invaded in open day and whose property is pillaged or destroyed by acts of violence, aimed at him in his official capacity and accompanied with studied insults to the Government he represents, and all proceeding from a riotous body of persons

who, presumably at least, ought to have been within the preventive or restraining power of the police or the military, and the accidental injury suffered by an individual in common with others, not in his character as consul, but as passenger on a vessel which has been unfortunate enough to be stranded on an unfrequented coast, subject to the incursions of savages which no reasonable foresight could prevent.

The case would present more points of comparison if some savage tribe of Indians on the warpath had unexpectedly stumbled upon a consul, we will say of Venezuela, travelling for his health in some of the secluded byways of Arizona or New Mexico, and then and there, without respect to the dignity of the consular office and the law of nations, had divested him of all his valuables and then proceeded *suo more* to take his scalp. Could it be pretended that the United States could be held responsible for an act of violence of this kind, although committed by persons actually within its jurisdiction and nominally subject to its authority? It is notorious throughout the world that outrages of this kind on the western frontier of the United States are more or less frequent, and that the whole military force of that country out of garrison has not been sufficient to prevent the occasional robbery or murder of innocent persons, whether aliens or citizens. Unless a Government can be held to be an insurer of the lives and property of persons domiciled within its jurisdiction, there is no principle of sound law which can fasten upon it the responsibility for indemnity in cases of sudden and unexpected deeds of violence, which reasonable foresight and the use of ordinary precautions can not prevent. Of course, if a Government should show indifference with reference to the punishment of the guilty authors of such outrages, another question would arise, but as long as reasonable diligence is used in attempting to prevent the occurrence or recurrence of such wrongs and an honest and serious purpose is manifested to punish the perpetrators, the best evidence of which, of course, will be the actual infliction of punishment, we fail to recognize any dereliction in the performance of international obligations, as measured by any practical standard which the good sense of nations will permit to be enforced.

... there is nothing in the record to show that the Government had any notice of the incursion or any cause to expect that such a raid was threatened, and while it may be true that Governments are *prima facie* responsible for the acts of their subjects and aliens ... within their jurisdiction, this is a presumption which is always rebuttable by any facts which will afford a reasonable excuse for the dereliction against which the complaint is aimed. A different rule of responsibility applies where the act complained of is only one in a series of similar acts, the repetition, as well as the open and notorious character, of which raises a presumption in favor of knowledge [of it] being [available] to the authorities and with it a corresponding accountability. It is in such a case that Sir Robert Phillimore says that it is to be "presumed that a sovereign knows what his subjects openly and frequently commit, and as to his power of hindering the evil this likewise is always presumed, unless the want of it be clearly proved." (Phill. Int. Law, p. 23.) The present case stands upon a different footing entirely. The tort committed proceeded from the wanton depredation of a lawless band of savages on a vessel unhappily stranded at a point where she could be made the easy prey of such marauders, before notice could be received by the Government, and under circumstances which satisfy us that notice is not imputable to the Government, and that the raid was one of those occasional and unexpected outbreaks against which ordinary and reasonable foresight could not provide. As soon as the facts were reported, immediate steps were taken for the relief of the vessel, and the savages were opened on with grape and cannon balls and dispersed. The claim is rejected.<sup>537</sup>

<sup>536</sup> Moore, *History and Digest ... (op. cit.)*, vol. IV, pp. 3703-3704.

<sup>537</sup> *Ibid.*, vol. III, pp. 3040-3043.

THE CASE OF BRISSOT *et al.* (*United States of America/ Venezuela*) (1889 and onwards)

351. The facts of this case involve the presence of the President of one of the States forming the Republic of Venezuela, General Juan Bautista Garcia, and a small military force, as passengers on board the *Apure*, a steamer operated on the Orinoco and Apure Rivers by the Orinoco Steam Navigation Company, of New York. After General Garcia embarked, the *Apure*, which was moored at a port, was suddenly attacked by a group of rebels against the régime of the General. The claimants contended that Venezuela was responsible for the deaths and damage resulting from the attack, as General Garcia caused the conflict by boarding the steamer and then using it as a shelter during the attack after the small military force accompanying him, sent ashore to deal with the rebels, had been routed. The claims were referred to the United States/Venezuelan Claims Commission under the Convention of 5 December 1885 (cases Nos. 27-30).

352. The three Commissioners agreed as to the non-liability of Venezuela for the attack itself.<sup>538</sup> While one Commissioner, Mr. Andrade, invoked self-defence and necessity in his opinion as circumstances precluding wrongfulness on Venezuela's part,<sup>539</sup> the other two Commissioners, Messrs. Little and Findlay, referred in their opinions to the elements of surprise and unforeseeability. Thus, Commissioner Little stated:

The question, then, is: wherein and how was Venezuela derelict in duty, if at all, in respect of this tragedy? The theory that General Garcia unlawfully or unwarrantably boarded the *Apure* with his troops, took military control of the boat, precipitated the attack at Apurito and [involved] the non-combatants on the vessel in the fight is not only not supported by the evidence, but against its decided weight. If these claims depended upon the establishment of anything like such a state of fact, they would have to be dismissed, for the facts and circumstances point quite to the contrary.

Garcia's embarkation was lawful and without coercion. The attack at Apurito was a surprise to him as much as to the master of the vessel. The simple truth seems to be that he disembarked his little squad of militia in the dark in an ambush of conspirators to hunt down and suppress whom, not improbably, he had started, and got this far on his trip up the river, though he is spoken of as being on a tour of observation. They bided their time, waited till the vessel was fastened, to prevent his escape, and then, on the appearance of his force, opened fire. The confusion and demoralization of his troops under the circumstances is not strange, or attributable to any fault of his. The criminals were the conspirators upon the shore.<sup>540</sup>

and Commissioner Findlay asserted:

... After reading the record and carefully considering the arguments, which have been very full and exhaustive, on both sides, it does not seem to me that any case has been made out against Venezuela, except that it did not go as far as it ought in bringing the offenders to justice. It surely had no means of knowing of or anticipating such a murderous outbreak as that which occurred at

Apurito. As I understand the testimony, General Garcia and his detachment of troops on board the *Apure* were entirely unprepared to meet the assault; and whatever may have been their expectations as to trouble somewhere on the route, certainly do not appear to have apprehended any difficulty at this particular point. The attack was in the nature of an ambush and a complete surprise. It would be wholly unwarranted, therefore, to hold Venezuela responsible for not anticipating and preventing an outbreak of which the persons most interested in knowing and the very actors on the spot had no knowledge.<sup>541</sup>

THE DU BOIS CASE (*Chile/United States of America*) (1894)

353. Edward Du Bois a citizen of the United States of America, claimed that he had possession as mortgagee of that part of the Chimbote, Huaraz and Recuay Railroad then completed and in operation, and also a large quantity of machinery, implements and material at Chimbote for the construction of the rest of the railroad. He claimed that the destruction and carrying away of his property by Chilean forces which occurred in 1880, 1881 and 1882, during a Chilean-Peruvian war, was not necessary as a military operation, and was wanton and without excuse. The case was submitted to arbitration under the Convention of 7 August 1892. The Chilean Government contended that the claimant possessed no individual property in the railroad and that the destruction and carrying away of the property was a legitimate act of war, as it belonged to Peru. The majority of the arbitral commission decided on 9 April 1894 that the Government of Chile was responsible for the "wanton and unnecessary destruction of the claimant's property by General Lynch, in command of the Chilean forces ..."<sup>542</sup>

THE EGERTON AND BARNETT CASE (*Chile/United Kingdom*) (1895)

354. During the night of 28/29 August 1891, the house of Egerton and Barnett in Valparaiso was burned as a result of acts of violence committed following the surrender of the city to revolutionist forces during the 1891 Chilean revolution. In its decision of 25 September 1895, the arbitral tribunal established under the Convention between Chile and Great Britain of 26 September 1893 concluded that the Government of Chile was not responsible for the loss incurred by the claimants. In reaching that conclusion, the Tribunal argued, *inter alia*, as follows:

Whereas it results from all these circumstances, officially recorded by the foreign authorities present, that if, despite the measures taken, serious disturbances took place at Valparaiso on the night of 28 to 29 August 1891, responsibility cannot be imputed to the Government, since, in the difficult circumstances in which it found itself after a bloody battle which brought to an end a civil war which had caused much unrest, it took what measures it could; that the extreme resolve to request the commanders of the squadrons to disembark foreign sailors is sufficient proof that there

<sup>538</sup> Venezuela was, however, held responsible for identifying and bringing to justice the guilty parties.

<sup>539</sup> Moore, *History and Digest ... (op. cit.)*, vol. III, pp. 2949-2967.

<sup>540</sup> *Ibid.*, p. 2967.

<sup>541</sup> *Ibid.*, p. 2969.

<sup>542</sup> *Ibid.*, vol. IV, p. 3713.

had not been any negligence or lack of foresight on its part such as to render it responsible;

...

Whereas, when a Government is temporarily incapable of controlling within its territory a part of its population or persons who have escaped from its authority and risen against it, in cases of rebellion, civil war or local disturbance, it is not responsible for the losses suffered by foreigners;

Whereas international law requires the military authorities of a belligerent country to do all in their power to ensure respect by the persons subject to their orders for the property of peaceful inhabitants, there is nothing to prove that the disturbances suffered by the city of Valparaiso were the act of soldiers of the victorious army, the only ones over whom their officers had still retained their authority; whereas it is moreover admitted by doctrine and by the precedents that acts of marauding and pillaging committed by disbanded soldiers removed from the supervision of their commanders do not render their Governments responsible; whereas such acts are regarded as offences in common law, subject only to regular criminal proceedings ...<sup>543</sup>

#### THE DUNN CASE (*Chile/United Kingdom*) (1895)

355. James E. Dunn, of Glasgow, owner of the bark *Birdston*, brought a claim against the Government of Chile for the losses and damage he had sustained as a result of acts of hostility during the revolution of 1891. According to the claimant, the *Birdston* arrived in the Chilean port of Pisagua on 14 January 1891 in order to carry a cargo of saltpetre from there to European ports, in accordance with the charter contract between a Chilean company, the captain of the bark and Dunn's shipping agent Robert Hunter. The contract gave Hunter 15 days to load the cargo, but exempted mutually liabilities arising out of disorders or political impediments ("*desórdenes o impedimentos políticos*"). On 17 January, when the vessels had loaded only part of the cargo, a Chilean warship came to the port and announced that a blockade would be established starting on 25 January. On 19 January, hostilities began in the port between the belligerents. In the circumstances, the loading of the cargo had to be suspended until 21 March. In the meantime, the claimant sustained damage to his vessel caused by cannon shells and losses due to a number of refugees who had taken shelter in the vessel and whom the captain had to look after. The Chilean Government disclaimed any responsibility on its part, arguing that the damages were caused by "legitimate acts of war". The case was referred to arbitration under the Convention of 26 September 1893.

356. In its award of 4 October 1895, the arbitral tribunal rejected the claim of Dunn, arguing as follows:

... whereas the situation in which it was impossible to carry out merchant shipping operations and particularly to load saltpetre in the port of Pisagua, as a result of a regular blockade, in fact lasted only three days; whereas actual blockade, notified in advance to neutral vessels, is a legitimate act of war and the Government proclaiming the blockade cannot therefore be held responsible for

its consequences for neutral vessels which had the option to put in at another port;

... whereas a Government cannot be obliged to pay compensation for demurrage to neutral vessels engaged in operations on behalf of third parties, unless it has illegally detained such vessels in its ports, using methods which are abusive or contrary to international law; whereas no responsibility is incurred by it when the delay in loading or unloading is the result of a war or of internal political disturbances;

... whereas the claimant has in no way proved that it was negligence on the part of the Government which prevented the *Birdston* from taking on its cargo before 21 March in order to complete the operation on 26 March; whereas, in addition, the [captain] admits in his log-book that the cargo had been partially loaded on 17 January and between 9 and 14 February; whereas it is public knowledge that the reason for the partial suspension of commercial operations at Pisagua at that time must be sought in the disturbed situation in the country during the civil war; whereas note was necessarily taken of the situation of neutrals, [but] they were not thereby given the right to demand compensation from the Government for damage caused outside its direct actions;

...

... whereas the two cannon shells which hit the *Birdston* on 23 January and 6 February, during the fighting between sea and land forces, [were stray shells discharged] during a regular battle and the Government cannot be held responsible for damage caused by this accident;

... whereas the [captain] of the *Birdston* voluntarily took refugees on board his vessel on two separate occasions, thus fulfilling a laudable humanitarian duty, but this does not legally give him the right to request the Government to reimburse the cost of looking after them; whereas it was not the local authorities which sent the refugees to him and he himself admits in an entry in his log-book that on 21 February he took on about a hundred refugees at the request of the British Consul ...<sup>544</sup>

#### THE GILLISON CASE (*Chile/United Kingdom*) (1895)

357. On 12 January 1891, a commercial vessel, the *British Army*, partly owned by Gillison, a British citizen, was entering the bay of Valparaiso when it was stopped by the warship *O'Higgins* and ordered to anchor at the port of Coquimbo, since that of Valparaiso was blockaded. The *British Army* stayed in Coquimbo until 4 February and, learning that the blockade was lifted, returned to Valparaiso on 16 February. In June 1891, the same ship anchored at Talcahuano to load a cargo of wheat, but the work had to be suspended for some 10 days owing to the war. Gillison brought a claim against the Chilean Government for the losses he had suffered during those two occasions. The Anglo-Chilean Arbitral Tribunal established pursuant to the Convention of 26 September 1893 rejected the claim. In its award of 17 December 1895, the Tribunal stated that, the port of Valparaiso having actually been under blockade during the period in question, Chile had no responsibility for the consequences of a legitimate act of war ("*acto legítimo de guerra*"). As to the suspension of work at the port of Talcahuano, the Tribunal again

<sup>543</sup> La Fontaine, *op. cit.*, pp. 455 and 456.

<sup>544</sup> Tribunal Arbitral Anglo-Chileno, *Reclamaciones presentadas al Tribunal Anglo-Chileno 1894-1896* (Santiago de Chile, Ercilla, 1896), vol. 1, pp. 537-538.

excluded the responsibility of Chile, stating that it was due to the state of war.<sup>545</sup>

358. In the written pleadings of the counsel for the Chilean Government, it was stated that:

... the Government of Chile is clearly not responsible by law, since the first part of the claim is derived from the actual and announced blockade of Valparaiso and international law exempts the belligerent imposing the blockade from any responsibility vis-à-vis third parties for this legitimate act of war; the second part of the request is motivated by the impediment to loading cargo for a certain number of days caused by the state of war, with no indication of the immediate cause; whereas every Government has the right to make war and, in the legitimate exercise of this right, it is not obliged to compensate for any damage caused to individuals; whereas it is impossible to prevent national or neutral trade from suffering the unfortunate consequences of the abnormal situation created by the war; whereas transactions, transport and all commercial activities inevitably undergo a paralysis for which the belligerents cannot be held responsible, ...<sup>546</sup>

THE WILLIAMSON, BALFOUR AND CO. CASE (*Chile/United Kingdom*) (1895)

359. The *British Sceptre*, owned by Williamson, Balfour and Company, arrived in the port of Valparaiso with a cargo of cement on 4 January 1891. According to the claimant company, the vessel had to suspend the unloading of its cargo after a few days because, owing to a revolution, all communication between vessels and the land was prohibited. Facing the danger of damage from the shelling exchanged between the two sides in the revolution, and at the suggestion of the British Consul, the vessel left the port on 16 January until it became safe to go back on 27 January. The claimant demanded compensation from the Chilean Government for the loss sustained due to the delay of delivery of the cargo. The Government of Chile denied responsibility, arguing, *inter alia*, that Valparaiso was the theatre of the main incidents of the revolutionary war, and the operations of war entailed such inconveniences without giving any grounds for demanding reparations.

360. In its award of 22 December 1895, the Anglo-Chilean Arbitral Tribunal established under the Convention of 26 September 1893 rejected the claim unanimously on the basis, *inter alia*, of the following:

... that a Government cannot be required to pay the expenses of delay caused to neutral vessels operating for the account of third parties unless it has disturbed their operations by vexatious means contrary to international law; that no responsibility arises for it where the delay in loading or unloading is the consequence of an act of war or internal political disturbances;

... that the claimant acknowledges in his application that, on the advice of the British Consul-general, the captain of the *British Sceptre* withdrew his vessel from the Valparaiso roadstead between 16 and 27 January 1891 to take shelter from the shooting which took place between the armed vessel *Blanco Encalada* and Valdivia Fort; that it was, therefore, a voluntary act on the part of the captain, who moved his vessel away from the port of unloading, and that, if he did so in order to save it from the consequences

of war, the Government cannot incur any responsibility under this head, since the acts of war carried out by both belligerents were legitimate.<sup>547</sup>

THE CRESCERI CASE (*Italy/Peru*) (1901)

361. On 3 September 1894, during the civil war in Peru, José Cresceri, an Italian citizen, was killed by government forces when he was on board the vessel *Coya* in the port of Puno on Lake Titicaca, the *Coya* being in the hands of revolutionary forces. It was found that at that time Cresceri was forced by the chief of the revolutionary forces to act as the bearer of a flag of truce (*parlementaire*) between the belligerents because of his neutral citizenship. After his death, his widow brought claims against the Peruvian Government. The case was submitted to arbitration under the Agreement of 25 November 1899. In his award of 30 September 1901, the arbitrator, Mr. Ramiro Gil de Uríbarri, held that the officers of the Peruvian forces were negligent and that the Peruvian Government was therefore to be held responsible for the death of Cresceri. He reasoned as follows:

That the armed conflict engaged in between the coalition forces on board the *Coya* and the forces of the Government of Peru, from the garrison at Puno, cannot be regarded as a pitched battle in the course of which persons foreign to the struggle might have been struck accidentally; nor can the commander or commanders of the armed force of the Government from the garrison at Puno be declared not responsible, since it has in no way been established that they warned the passengers on the *Coya*, who were not involved in the political conflict, and the foreign women and children to withdraw to shelter before giving the order to open fire.

That, whatever the situation from this point of view, responsibility rests with those commanders and that this responsibility devolves upon the Government, and the more so because, in the absence of such an injunction, a neutral alien, peaceful and defenceless, was made the bearer of a flag of truce and that thus the absence of the injunction was the cause, if not direct at least proximate, of his death.

That responsibility also rests with the commander of the coalition forces, not only because he forced an alien, who was taking no part in the fight and in the political events, to carry out such a dangerous mission, but also because he did not take the necessary precautions which should be taken in such cases to safeguard the life of the bearer of the flag of truce.

That, even admitting that the gravity of the responsibility of the troops is diminished by the fact that it has not been proved that they opened fire intentionally and deliberately on José Cresceri with the intention of killing him, it has not been established that the Government of Peru has occupied itself in any way with seeking out the author of Cresceri's death and, the truth having been established, with taking the appropriate action.

That, from this account ... it emerges that responsibility rests with the Government of Peru by reason of the negligence of the above-mentioned officers of the Peruvian vessel *Coya*, whose duty it was to make every effort to safeguard the lives of their passengers, which there is no evidence that they did ...<sup>548</sup>

<sup>545</sup> *Ibid.*, vol. III, p. 386.

<sup>546</sup> *Ibid.*, pp. 383-384.

<sup>547</sup> *Ibid.*, pp. 351 and 352.

<sup>548</sup> United Nations, *Reports of International Arbitral Awards*, vol. XV (United Nations publication, Sales No. 66.V.3), pp. 451 and 452.

THE PIOLA CASE (*Italy/Peru*) (1901)

362. Luis Piola, an Italian resident in Peru, claimed an indemnity from the Government of Peru for the death of his brother Lorenzo, which had occurred on 17 March 1895 during a civil war in that country, due to bullets allegedly shot by government soldiers. The case was referred to arbitration under the Agreement of 25 November 1899. In his award of 30 September 1901, the arbitrator, Mr. Ramiro Gil de Urbarri, pointed out that from the testimony made by two witnesses it did not appear at all that the death of Lorenzo Piola was caused intentionally, since he was at the time of injury in the courtyard of a house whose door was kept closed. He dismissed the claim, arguing further:

It results from this that the death of Lorenzo Piola, if it was in fact the consequence of the two bullets he received, was not the result of an attack but of a fortuitous and unhappy accident.<sup>549</sup>

THE MARTINI CASE (*Italy/Venezuela*) (1903)

363. On 28 December 1898, the Venezuelan Government leased to Lanzoni, Martini and Co. a national enterprise in the state of Bermudez known as "Ferrocarril de Guanta y Minas de Carbón". Included in the lease was a wharf for the embarkation of coal, a warehouse, workshops, railways between Guanta and the mines, with rolling stock, material on hand, and bridges; the mines and other rights and shares belonging to the national Government. The company undertook to pay annually to the national Government a certain sum in cash and a certain amount of taxes for each ton of coal extracted. During the period between August 1902 and April 1903, the area in question was subjected to frequent acts of revolutionary war, with consequential damage to the property and interests of the company.

364. The matter was referred to the Italian/Venezuelan Mixed Claims Commission established under the Protocol of 13 February 1903. After having estimated the loss of profit from the mine during the period concerned, the umpire, Mr. Ralston, stated:

It would, however, be manifestly unfair to hold the Government responsible for this amount, because a very large part of the difficulty in working the mines was due to the direct action of revolutionaries, with whom the Government was at war, and another considerable percentage must be attributed to the fact that the mines could not have been worked with thorough success even had the Government properly performed its duties, because of the existence of a state of warfare in the neighbourhood of the mines and railway, as well as at the port of Guanta, a condition for which the Government can not be held to contractual or other responsibility.<sup>550</sup>

Regarding other damages, the umpire said:

No account is taken of the injury to the railroad track, consequent upon its being turned into a passageway for animals, the authorities being pecuniarily unable during the war to keep up the roads. This was an unfortunate consequence of war for which the company can claim no personal indemnity.

Many of the other claims for damage rest upon the existence of war, for which Venezuela can not be specially charged, however regrettable the facts in themselves may be.<sup>551</sup>

THE PETROCELLI CASE (*Italy/Venezuela*) (1903)

365. This case was also referred to the Italian/Venezuelan Mixed Claims Commission established under the Protocol of 13 February 1903. During the civil war in Venezuela in 1902, government troops entrenched themselves in front of Petrocelli's dwelling house in Ciudad Bolívar. As a result of a battle which occurred afterwards, the house was greatly damaged. The umpire, Mr. Ralston, held the Venezuelan Government responsible for the damage done to the house. He said:

When the Government troops entrenched themselves in front of the claimant's habitation and took possession, they made it the object of the enemy's attack. They gave it up specially to public use. Claims for damage to it were taken out of the field of the incidental results of war, the Government having invited its destruction. The claimant's property was exposed to a special danger, in which the property of the rest of the community did not share. The Government's responsibility for its safe return was complete.<sup>552</sup>

THE SAMBIAGGIO CASE (*Italy/Venezuela*) (1903)

366. Salvatore Sambaggio, an Italian citizen, brought a claim against the Venezuelan Government for the requisitions and forced loans exacted of him by revolutionary troops when he was residing at San Joaquín, Venezuela. The claim was referred to the Italian/Venezuelan Mixed Claims Commission established under the Protocol of 13 February 1903.

367. The Italian Commissioner contended that Italy was justified in claiming damages on behalf of Sambaggio, because "judging from the results it must be admitted that the means employed by [the Government] for [maintaining order] are, to say the least, inefficient, and from this its responsibility is deduced as a logical sequence ..."<sup>553</sup>

368. On the other hand, the Venezuelan Commissioner argued:

Governments, according to the authorities, are not responsible for the acts of individuals in rebellion, precisely because they are in rebellion ... A Government would be responsible, in the concrete, where it had been negligent in the protection of individuals; but in such case the responsibility would arise from the fact that the Government, by its conduct, had laid itself open to the charge of complicity in the injury. The acts of revolutionaries are outside [the control] of the Government.

...  
The responsibility of a Government is in proportion to its ability to avoid an evil. A Government sufficiently powerful in all its attributes to prevent the occurrence of evil, but by negligence permitting it, is doubtless more accountable for the preservation of order than one not so endowed.

<sup>549</sup> *Ibid.*, pp. 444-445.

<sup>550</sup> *Ibid.*, vol. X (Sales No. 60.V.4), pp. 666-667.

<sup>551</sup> *Ibid.*, p. 668.

<sup>552</sup> *Ibid.*, p. 592.

<sup>553</sup> *Ibid.*, p. 504.

...  
It has, however, been maintained by various Governments and authorities that in certain particular cases and ... circumstances thereof a State might properly be charged with responsibility for damage to an individual, in the event of its being demonstrated that the State had been wholly negligent in furnishing the protection which could be reasonably expected from it. In accordance with this theory, the Government is not responsible for lack of protection not resulting from a culpable neglect so great as to equal an act of its own against private property.

...  
Whosoever, therefore, makes a claim against the State in such case must establish two things:

1. That he has actually suffered the damage alleged.

2. That the State is in a certain manner responsible, through its negligence, for the damage committed.<sup>554</sup>

369. The umpire, Mr. Ralston, rendered the following opinion favourable to Venezuela:

... Governments are responsible, as a general principle, for the acts of those they control. But the very existence of a flagrant revolution presupposes that a certain set of men have gone temporarily or permanently beyond the power of the authorities; and unless it clearly appear that the Government has failed to use promptly and with appropriate force its constituted authority, it can not reasonably be said that it should be responsible for a condition of affairs created without its volition. When we bear in mind that for six months previous to the [exactions] complained of in the present case a bloody and determined revolution demanding the entire resources of the Government to quell it had been raging throughout the larger part of Venezuela, it can not be determined generally that there was such neglect on the part of the Government as to charge it with the offences of the revolutionists whose acts are now in question.

We find ourselves therefore obliged to conclude, from the standpoint of general principle, that, save under the exceptional circumstances indicated, the Government should not be held responsible for the acts of revolutionists because:

1. Revolutionists are not the agents of government, and a natural responsibility does not exist.

2. Their acts are committed to destroy the Government, and no one should be held responsible for the acts of an enemy attempting his life.

3. The revolutionists were beyond governmental control, and the Government can not be held responsible for injuries committed by those who have escaped its restraints.<sup>555</sup>

#### THE CASE OF KUMMEROW *et al.* (Germany/Venezuela) (1903)

370. This case was submitted to the German/Venezuelan Mixed Claims Commission under the Protocol of 13 February 1903. The German and the Venezuelan commissioners disagreed as to the liability of Venezuela under the Protocol for acts of revolutionists in the civil war and as to the responsibility of Venezuela for wrongful seizures of or injuries to property. The umpire, Mr. Duffield, considered that the Government of Venezuela was liable, under its "admissions in the Protocol" for all claims for injuries to or wrongful seizures of property by revolutionists resulting from the civil war. At the same time, he recognized that such admissions did not ex-

tend to injuries to or wrongful seizures of property at any other time or under any other condition and did not include injuries to the person. As to these two last causes of claims, the umpire considered that the liability of Venezuela must be determined by general principles of international law, under which Venezuela was not liable, because the civil war, from its outset, had gone beyond the control of the titular Government.<sup>556</sup> He argued, *inter alia*, as follows:

Here, Germany requires from Venezuela an admission of liability in as broad terms as can be used. Venezuela could and should have explained its understanding of them. Not having done so then, it can not do so now. When Venezuela admits, without qualification, liability for wrongful seizures of or injuries to property growing out of insurrectionary events during the civil war, it must be held to admit its liability for all wrongful seizures of persons and property during that period and under those conditions.

Moreover, substantially all the authorities on international law agree that a nation *is responsible* for acts of revolutionists under certain conditions—such as lack of diligence, or negligence in failing to prevent such acts, when possible, or as far as possible to punish the wrongdoer and make reparation for the injury. *There is*, therefore, a rule of international law under which Venezuela would be held liable in certain cases for acts of revolutionists. And there are some very respectable authorities which hold that a nation situated with respect to revolutions as Venezuela has been for the past decade and more, and with the consequent disordered condition of the State, is not to be given the benefit of such exemption from liability. These considerations may be presumed to have been in the mind of either or both of the contracting parties, and to have induced the insertion in the protocol of the admission of liability.

The case, therefore, is one in which two nations which are presumably aware of this diversity of opinion among nations, as well as between themselves, as to the liability of Governments for the acts of revolutionists enter into a solemn agreement containing an express admission of liability for *all wrongful seizures of or injuries* to property growing out of insurrectionary events in a civil war. Can there be any other conclusion than that they intended to settle themselves this question of liability and not leave it to be determined as a commission might decide, one way or another?

...  
In view of these considerations, the umpire is of the opinion that the admission of liability in article III extends to claims of German subjects for wrongful seizures of or injuries to property resulting from the present Venezuelan civil war, whether they are the result of acts of governmental troops or of Government officials or of revolutionists.

This, however, does not dispose of the entire question. First, the admission of liability in article III does not include injuries to the person; it covers only seizures of or injuries to property. Second, of these it only includes those resulting from the present Venezuelan civil war. The liability in these two classes of claims must be determined, therefore, upon the general principles of international law, because in the language of the protocol, read in the light of the British and German memorandum of December 22, 1902, *they* are referred to "arbitration without any reserve".

In thus determining them, it is not, however, necessary to discuss the general question of the character and extent of the liability of a nation for acts of insurgents. There is diversity of opinion among the authorities on the question.

In the opinion of the umpire, however, the modern doctrine, almost universally recognized, is that a nation is not liable for acts of revolutionists when the revolution has gone beyond the control of the titular Government. It is not necessary that either a state of

<sup>554</sup> *Ibid.*, pp. 507, 509 and 511.

<sup>555</sup> *Ibid.*, p. 513.

<sup>556</sup> *Ibid.*, pp. 390–402.

war, in an international sense, should exist or any recognition of belligerency. Immunity follows inability.

This rule was very recently affirmed and approved by the United States/Spanish Treaty Claims Commission sitting at Washington, 28 April 1903 (opinion No. 8).

Judicial cognizance can properly be taken of the condition of Venezuela during the present civil war. And there can be no doubt that from its outset it went beyond the power of the Government to control. It was complicated by the action of the allied Powers in seizing the forts and war vessels of Venezuela; and if it is now fully suppressed (as is to be hoped), its extinction was only within a few days past. During all this period, considerable portions of the country and some of its principal cities have been held by revolutionary forces. Large bodies of organized revolutionist troops have traversed the country, and in their train have followed the usual marauding and pillage by small bands of guerrillas and brigands. The supreme efforts of the Government were necessary and were directed to putting down the rebellion. Under such circumstances, it would be contrary to established principles of international law and to justice and equity to hold the Government responsible.<sup>557</sup>

#### THE BISCHOFF CASE (*Germany/Venezuela*) (1903)

371. In August 1898, during an epidemic of smallpox at Caracas, the police took a carriage belonging to a German citizen, Bischoff, and conveyed it to the house of detention upon receiving information that it had carried two persons afflicted with the disease. The carriage had been exposed to the weather for a considerable time until, upon ascertaining the false nature of the information, the police offered to return it to Bischoff. He thereupon refused to accept the carriage unless the police paid for damage done to it. The case was referred to the German/Venezuelan Mixed Claims Commission constituted under the Protocols of 13 February and 7 May 1903.

372. The Commissioner for Venezuela considered that there was no liability in such a state of affairs. While admitting that the taking was made in good faith, and, because of the smallpox epidemic then existing, was justified, the German Commissioner argued that the claimant was not bound to accept the return of the carriage and that Venezuela was liable for its value. In his opinion, the umpire, Mr. Duffield, admitted that there was no liability for taking the carriage. In his words: "... the carriage was taken in the proper exercise of discretion by the police authorities. Certainly, during an epidemic of an infectious disease there can be no liability for the reasonable exercise of police power, even though a mistake is made".<sup>558</sup> However, the umpire, following the view expressed "in a number of cases before arbitration commissions involving the taking and detention of property, where the original taking was lawful", considered that the defendant Government was liable for damage resulting to the carriage from its detention for "an unreasonable length of time" and for injuries to it during that period.<sup>559</sup>

<sup>557</sup> *Ibid.*, pp. 397, 398 and 400.

<sup>558</sup> *Ibid.*, p. 420.

<sup>559</sup> *Ibid.*

#### THE SANTA CLARA ESTATES CO. CASE (*United Kingdom/Venezuela*) (1903)

373. In 1902 and 1903, the Santa Clara Estates Company, a British concern, was carrying on business in the Orinoco district of Venezuela when that district was entirely in the hands of revolutionaries. A revolutionary body established itself as the government of that part of the country and to a certain extent entered upon the discharge of governmental functions. During that time, the livestock belonging to the Santa Clara Estates Company was taken for the use of the revolutionaries, thereby causing losses to the company. The British Government contended that there was negligence on the part of the titular Government in allowing its rebellious subjects to maintain an independent government for so long, and that there was a limit within which the Government should have been able to reduce the revolutionaries to subjection. The claim was referred to the British/Venezuelan Mixed Claims Commission established under the Protocol of 13 February 1903.

374. The umpire, Mr. Plumley, rejected the British argument, saying that more dependence should be placed upon the actual diligence applied by the titular Government to regain its lost territory and to suppress the revolutionary efforts than upon the mere question of the time taken to accomplish that end. He posed the following question in connexion with the case:

Was the length of time during which this independent government existed the result of the inefficiency and negligence of the Government in its general efforts to put down the revolution and to regain its lost territory throughout the whole country of Venezuela, or was it due to the extent, strength, and force of the revolution itself?<sup>560</sup>

In order to answer the question, the umpire went into a detailed examination of the historical background of revolutionary wars in Venezuela during the period 1900-1903, and concluded:

A war in which there were, in a little over one year, twenty sanguinary battles, forty battles of considerable character, and more than one hundred lesser engagements between contending troops, with a resultant loss of 12,000 lives, can hardly suggest passivity or negligence on the part of the national Government towards the revolution; and the umpire is impressed with the fact that such control as the revolutionists obtained in certain portions of the country was owing rather to the financial aid which it received through its chief, Matos, who, with the great body of men under his standard, made a combination for a time irresistible and overwhelming, than to any weakness, inefficiency, or negligence on the part of the titular Government. In other words, history compels a belief that the Government did in fact what it has a right to have assumed it would do—made the best resistance possible under all the existing circumstances to the revolutionary forces seeking its overthrow.

...  
It is therefore the opinion of the umpire that there was no undue delay on the part of the Government in the restoration of its power in the district under consideration, and that it was not through the weakness, inefficiency, or passivity of the Government

<sup>560</sup> *Ibid.*, vol. IX (Sales No. 59.V.5), p. 456.



that the revolution of liberation remained in control for the time named, but rather through its inherent strength in men, materials and money, and in certain assisting circumstances.<sup>561</sup>

#### THE BEMBELISTA CASE (*Netherlands/Venezuela*) (1903)

375. On 11 November 1899, the dwelling house, furniture, etc. of a Netherlands resident, Bembelista, at Puerto Cabello suffered damage as a result of a battle between the Government and rebel forces for the town. The house was situated near one of the entrenchments in the town. The claim brought by Bembelista against Venezuela was referred to the Netherlands/Venezuelan Mixed Claims Commission under the Protocol of 28 February 1903. The umpire, Mr. Plumley, rejected the claim, saying that the damage in question was inflicted in the course of battle and in the rightful and successful endeavour of the Government to repossess itself of one of its important towns and ports. The destruction of the entrenchments and the occupation of the town by government troops "were compelled by the imperious necessity of war". He said:

... It was the misfortune of the claimant that his building was so near to one of the principal entrenchments, where there was the most serious resistance, and the [damage caused to] his property [was] one of the ordinary incidents of battle ...

There is always a presumption in favour of the Government that it will be reasonable and will not be reckless and careless, and in this case the facts proved prevent any possible removal of that presumption. The Government bullets were directed towards the place required to ensure success, and that there was so far a misdirection of those bullets as to do harm to his property, located in such close proximity, was a mere accident attending the rightful performance of a solemn duty. The most careful inspection of the case shows nothing that puts this property within the list of exceptional instances, but rather they all place it in the immediate line of battle, and in the very track of flagrant war.<sup>562</sup>

#### THE MAAL CASE (*Netherlands/Venezuela*) (1903)

376. Maal, a commercial traveller of Netherlands nationality representing business firms in the United States of America and in Europe, arrived on 10 June 1899 in the port of La Guaira on board the *Caracas* and was about to enter the train bound for the city of Caracas, when he was accosted by a Venezuelan citizen, accompanied by armed police, who informed him that he was under arrest. His trunks were opened and examined and he was further stripped of his clothing. He was then taken to the civil chief of the city, who, after communicating by telephone with the President of the Republic, informed the claimant that he was suspected of being a conspirator against the Government of Venezuela and in the interest of revolutionaries, and that he had to leave the country at once. He was forced to go back to the *Caracas*, which shortly left for Curaçao. The claimant denied

at the time all connexion with revolutionary matters connected with Venezuela. The case was referred to the Netherlands/Venezuelan Mixed Claims Commission established under the Protocol of 28 February 1903.

377. In his decision, the umpire, Mr. Plumley, stated, *inter alia*, the following:

... It is [a matter of history] that the date of this exclusion from Venezuela was within that period of Venezuela's national life when there were more than the ordinary hazards to the country from revolutionary action and conspiracies, and it was undoubtedly necessary that the national Government should be on the alert to protect itself against such evils; and had the exclusion of the claimant been accomplished in a rightful manner without unnecessary indignity or hardship to him, the umpire would feel constrained to disallow the claim.

... The umpire acquits the high authorities of the Government from any other purpose or thought than the mere exclusion of one regarded dangerous to the welfare of the Government, but the acts of their subordinates in the line of their authority, however odious their acts may be, the Government must stand sponsor for. And since there is no proof or suggestion that those in discharge of this important duty of the Government of Venezuela have been reprimanded, punished or discharged, the only way in which there can be an expression of regret on the part of the Government and a discharge of its duty toward the subject of a sovereign and a friendly State is by making an indemnity therefor in the way of money compensation. This must be of a sufficient sum to express its appreciation of the indignity practised upon this subject and its high desire to discharge fully such obligation ...<sup>563</sup>

#### THE MENA CASE (*Spain/Venezuela*) (1903)

378. In May 1899, belligerent forces in Venezuela destroyed a ranch owned by González Mena, a Spanish citizen. As a result, a certain number of his horses were lost, for which he claimed compensation from the Venezuelan Government. The case was referred to the Spanish/Venezuelan Mixed Claims Commission established under the Protocol of 2 April 1903. The umpire, Mr. Gutierrez-Otero, rejected the contention of the Venezuelan Commissioner, which was essentially based on the following two principles: (a) the State is responsible only for the acts done by its agents and not for damage which insurgents or revolutionary forces cause to foreigners; (b) the State is not responsible for damage caused as a consequence of war because damage of this sort was considered as caused by *force majeure*, which exempts it from liability. Commenting on the first of those two principles, the umpire said:

... the umpire has, upon another occasion, already decided that, although after a long discussion the theory has undoubtedly prevailed concerning the non-responsibility of States for damage which insurgents cause to the persons or property of foreigners living in their territory, and such a principle is now considered as a rule properly called one of international law, it does not govern a tribunal of the nature of this Mixed Commission, which, according to the protocol that created it, should, on the contrary, necessarily base its judgments upon absolute equity and not take into consideration objections of a technical nature which may be raised before it. ...<sup>564</sup>

<sup>561</sup> *Ibid.*, p. 458.

<sup>562</sup> *Ibid.*, vol. X (*op. cit.*), p. 718.

<sup>563</sup> *Ibid.*, pp. 732-733.

<sup>564</sup> *Ibid.*, p. 749.

Concerning the second principle referred to by the Venezuelan Commissioner, he stated:

... substantially the same must be said, since if this doctrine to a certain degree did absolutely exist, that acts of war do not give rise to the responsibility which obliges States to [go to] arbitration, it would be modified by the theory that the distinction between these cases should be made as to those which, properly speaking, are defensible, and those which are not, therefore, of the nature of a fatal necessity.<sup>565</sup>

THE AMERICAN ELECTRIC AND MANUFACTURING CO.  
CASE (*United States of America/Venezuela*) (1903)

379. The claim of the American Electric and Manufacturing Company against the Venezuelan Government was based on two distinct groups of facts. The first was the taking possession by the Government of the State of Bolívar on 26 May 1901, of the telephone office and service of the line for the use and convenience of military operations against revolutionary troops and the damage which the property so occupied suffered in consequence thereof owing to acts of destruction committed by the revolutionaries. The second consisted in the damage suffered by the telephone line in August 1902 during the bombardment of Ciudad Bolívar by the vessels of the Venezuelan Government. Commissioner Paul, on behalf of the United States/Venezuelan Mixed Claims Commission established under the Protocol of 17 February 1903, concluded that the company was entitled to compensation for damages relating to the first group of facts but disallowed the claim for damages arising from the second group.

380. He stated in his opinion the following:

...  
The general principles of international law which establish the non-responsibility of the Government for damage suffered by neutral property owing to imperious necessities of military operations within the radius of ... operations, or as a consequence of the damages of a battle, incidentally caused by the means of destruction employed in the war which are not disapproved by the law of nations, are well known.

Nevertheless, the said principles likewise have their limitations according to circumstances established by international law, as a source of responsibility, when the destruction of the neutral property is due to the previous and deliberate occupation by the Government for the public benefit or as being essential for the success of military operations. Then, the neutral property has been destroyed or damaged by the enemy because it was occupied by the government troops, and for that reason only.

...  
The seizure of the office and telephone apparatus by the Government at Ciudad Bolívar, required as an element for the successful operations against the enemy, the damage suffered and done by the revolutionaries as a consequence of such seizure, gives to the American Electric and Manufacturing Company the right to a just compensation for the damage suffered on account of the Government's action.

The claimant company, producing the evidence of witnesses, claims that the damage caused amounts to the sum of \$4,000, but it must be taken into consideration that the witnesses and the company itself refer to all the damages suffered by the telephone enterprise from the commencement of the battle, which began on

23 May, while the seizure of the telephone line by the Government, which is the [basis] justifying the recognition of the damages, only took place on the 26th, which reduces in a notable manner the amount for damages which has to be paid by the Government and therefore the damage is held to be estimated in the sum of \$2,000.

With reference to the second section of the claim for the sum of \$2,000 for damages suffered by the telephone company during the bombardment of Ciudad Bolívar in August 1902, these being the incidental and necessary consequences of a legitimate act of war on the part of the Government's men-of-war, it is therefore disallowed.

No interest is allowed, for the reason that the claim was never officially presented to the Venezuelan Government.

In consequence thereof an award is made in favor of the American Electric and Manufacturing Company for its claim against the Venezuelan Government in the sum of \$2,000 American gold.<sup>566</sup>

THE JENNIE L. UNDERHILL CASE (*United States of America/Venezuela*) (1903)

381. Initially, this claim related to damages claimed against the Government of Venezuela by Jennie L. Underhill for assault, insult and abuse and for imprisonment, but, in his subsequent submissions, the agent of the United States of America based the claim on unlawful arrest and detention. The umpire, Mr. Barge, of the United States/Venezuelan Mixed Claims Commission, established under the Protocol of 17 February 1903, rejected the charge of unlawful arrest but sustained the one of detention and awarded, on that account, compensation to the claimant. The passage of his opinion referred to the original claim for assault, insult and abuse as follows:

Whereas, perhaps, practically the admitting of the other causes named in the claim and in the first brief would be of no great influence, since the evidence shows that, whatever may or might have been proved to have happened to the claimant's husband, George Underhill, there is no proof of any assault, insult, or abuse as regards Jennie Laura Underhill, except what happened on the morning of 11 August 1892, when an irritated, exasperated and ungovernable mob, which believed the Underhills to be partial to the very unpopular party with whose chiefs and officials they were on the point of escaping from the city—which conviction was not without appearance of reason, fostered by the fact that the Underhills entertained the commanding general and chiefs of that party on their departure to fight the then popular "Legalista" party—prevented her from leaving the city and assaulted, insulted and abused her; for which assault, insult, and abuse by an exasperated mob in a riot, the Government, even while admitting that on that morning there was a *de facto* government in Ciudad Bolívar (*quod non*) can not be held responsible, as neither according to international, national or civil law nor whatever law else, can anyone be liable for damages where there is no fault by unlawful acts, omission, or negligence; whilst, in regard to the events of the morning of 11 August 1892, there is no proof of unlawful acts, omission, or negligence on the part of what then might be regarded as the local authority, which neither was the cause of the outrageous acts of the infuriated mob nor in these extraordinary circumstances could have prevented or suppressed them; still, equity to the contending parties seems to require that, after the replication of the honourable agent of the United States of America, unlawful arrest and detention be looked upon as the acknowledged cause of this claim ...<sup>567</sup>

<sup>565</sup> *Ibid.*, p. 750.

<sup>566</sup> *Ibid.*, vol. IX (*op. cit.*), pp. 146–147.

<sup>567</sup> *Ibid.*, pp. 159–160.

THE GENOVESE CASE (*United States of America/Venezuela*) (1903)

382. This case related to an alleged breach of a contract entered into by Virgilio de Genovese, the claimant, and the Government of Venezuela. The case was dealt with by the United States/Venezuela Mixed Claims Commission established pursuant to the Protocol of 17 February 1903. Commissioner Paúl, in his opinion for the Commission, stated, *inter alia*, the following:

...  
The damages claimed for the stoppages of the work amounting to the sum of 262,250 bolívares, and the interest at 6 per cent per annum on the balance due for the price of the first and second sections which the claimant puts forward for 43,019 bolívares, must be disallowed, because the stoppage of the work has not been caused by arbitrary action of the Government of Venezuela, but by the natural consequences of the civil war, which were admitted by the same contractor as justified, as it appears from his correspondence with the Department of Public Works.

The damage for indignities suffered and for loss of mules, etc., on March 2, 1903, amounting to 25,000 bolívares, can not be taken into consideration, as the fact on which this part of the claim is founded appears to consist in an act of highway robbery that can not affect the responsibility of the Government of Venezuela ...<sup>568</sup>

THE ABOILARD CASE (*France/Haiti*) (1905)

383. On 26 February 1902, the authorities of the Haitian Government concluded a transaction with M. L. Aboilard, a French citizen. According to its terms, the latter transferred to the Government all the rights relating to the concession contract of the lighting system of the city of Jacmel, including all the material and facilities belonging thereto. The Government agreed to pay certain sums of money for the rights and property so ceded. It was also agreed that the Government would grant Aboilard a concession for the period of 30 years, starting from that day, of the exclusive exploitation of the water service of Port-au-Prince and Pétionville, as well as the electric energy of Port-au-Prince. Subsequently, the Haitian Government failed to execute the contracts concluded under the transaction because, *inter alia*, the Government was not able to obtain the approval of the legislature, which was required under the Constitution. The Government contended that the contracts therefore became null and without effect.

384. The Arbitration Commission established under the Protocol of 15 June 1904 rejected, in its decision of 26 July 1905, the argument of the Haitian Government. The Commission reasoned, *inter alia*, as follows:

That, in view of the circumstances, the nature of the document and a number of its clauses, Mr. Aboilard had every reason to believe that the concessions granted to him were not simply planned but were definitive; ... that there was, at least, a serious fault on the part of the Haitian Government of the time in entering into a contract in such conditions, in creating legitimate expect-

tations which, having been disappointed by the act of the Government itself, entailed damage for which compensation is due ...<sup>569</sup>

THE CASE OF THE COMPAGNIE FRANÇAISE DES CHEMINS DE FER VÉNÉZUÉLIENS (*France/Venezuela*) (1905)

385. In 1888, the Compagnie française des chemins de fer vénézuéliens was established to take over a concession which the Duke of Morny, a French citizen, had obtained from the Government of Venezuela. The company was to build a railroad, canalize rivers, exploit and enjoy the revenues of the enterprise for a period of 99 years, etc. After the completion of the railroad, during the years 1882–1884, the company suffered losses resulting from Venezuelan insurrections. In 1898, another revolutionary movement affected especially the areas of the company's business, causing further losses and damage. In the circumstances, the company informed the Government of Venezuela in 1899 that it was obliged to suspend the exploitation of its line and its steamers because of *force majeure*. Late in 1899, the company's steamer *San Carlos y Mérida* was sunk as a result of the damage to its hull sustained during an engagement between the warring forces.

386. A claim was brought by the company against Venezuela for the destruction of the enterprise and other losses. The case was referred to the French/Venezuelan Mixed Claims Commission established under the Protocol of 27 February 1903. In his award of 31 July 1905, the umpire dismissed the contention of the claimant that the Venezuelan Government was the sole cause of the damages to the enterprise, arguing that that Government:

... can not be charged with responsibility for the conditions which existed in 1899, prostrating business, paralyzing trade and commerce, and annihilating the products of agriculture; nor for the exhaustion and paralysis which followed; nor for its inability to pay its just debts; nor for the inability of the company to obtain money otherwise and elsewhere. All these are misfortunes incident to government, to business, and to human life. They do not beget claims for damages.

The claimant company was compelled by *force majeure* to desist from its exploitation in October, 1899; the respondent Government, from the same cause had been prevented from paying its indebtedness to the claimant company. The umpire finds no purpose or intent on the part of the respondent Government to harm or injure the claimant company in any way or in any degree. Its acts and its neglects were caused ... by entirely different reasons and motives. Its first duty was to itself. Its own preservation was paramount. Its revenues were properly devoted to that end. The appeal of the company for funds came to an empty treasury, or to one only adequate to the demands of the war budget. When the respondent Government used, even exclusively, the railroad and the steamboats it was not outside its contractual right nor beyond its privilege and the company's duty had there been no contract. When traffic ceased through the confusion and havoc of war, or because there were none to ride and no products to be transported, it was a dire calamity to the country and to all its people; but it was a part of the assumed risks of the company when it entered upon its exploitation.

<sup>568</sup> *Ibid.*, p. 240.

<sup>569</sup> *Revue générale de droit international public* (Paris), vol. XII, 1905, "Documents", p. 15.

When revolution laid waste both country and village, or seized the railroad and its material, or placed its hands upon the boats and wrought serious injury to all, it is regrettable, deplorable, but it is not chargeable upon the respondent Government, unless the revolution was successful and unless the acts were such as to charge responsibility under the well-recognized rules of public law. These possible disordered conditions of a country are all discounted in advance by one who enters it for recreation or business. It is no reflection upon the respondent Government to say that the claimant company must have entered upon its exploitation in full view of the possibility, indeed, with the fair probability, that its enterprise would be obstructed occasionally by insurgent bands and revolutionary forces and by the incidents and conditions naturally resulting therefrom.<sup>570</sup>

Regarding the sinking of the *San Carlos y Mérida*, the umpire considered that it was "without doubt, an accident of war" and hence the Government of Venezuela was not responsible for it.<sup>571</sup>

#### THE LISBOA CASE (*Bolivia/Brazil*) (1909)

387. In 1909, a Brazilian/Bolivian Arbitral Tribunal refused to sustain a claim for indirect losses caused by the cessation of profit due to a revolution. The Tribunal was of the opinion that this event did not depend upon the will of the Government and stated:

The cessation of profit, the diminution of business, and the economic perturbations are corollaries of war extending to nationals and foreigners, injuring both belligerents and neutrals, and, resulting from cases of *force majeure*, they do not entail an obligation to indemnify.<sup>572</sup>

#### THE RUSSIAN INDEMNITY CASE (*Russia/Turkey*) (1912)

388. In the Protocol signed at Adrianople on 19 (31) January 1878, putting an end to hostilities between Russia and Turkey by an armistice, the Government of Turkey agreed to indemnify Russia for the cost of the war and the losses that it had suffered. Article 19 of the *Préliminaires de paix* signed at San Stefano on 19 February (3 March) 1878 fixed the total amount of the indemnities at 1,400 million roubles, 10 million of which were allocated for damages to "Russian subjects and institutions in Turkey".<sup>573</sup> Concerning the payment of the sum allocated for compensating such damages, article V of the Treaty of Peace, signed at Constantinople on 27 January (8 February) 1879, provided that:

The claims of Russian subjects and institutions in Turkey for compensation for damages suffered during the war will be paid as soon as they are examined by the Russian Embassy at Constantinople and forwarded to the Sublime Porte. The total of these

<sup>570</sup> United Nations, *Reports of International Arbitral Awards*, vol. X (*op. cit.*), pp. 353-354.

<sup>571</sup> *Ibid.*, p. 354.

<sup>572</sup> Reported in J. H. Ralston, *The Law and Procedure of International Tribunals*, rev. ed. (Stanford, Calif., Stanford University Press, 1926), p. 244.

<sup>573</sup> United Nations, *Reports of International Arbitral Awards*, vol. XI (Sales No. 61.V.4), p. 434.

claims may not, in any event, exceed the sum of twenty-six million seven hundred and fifty thousand francs.<sup>574</sup>

389. Pursuant to this provision, a commission which was established at the Russian Embassy at Constantinople to examine the damages fixed the total at 6,186,543 francs. This was communicated to the Sublime Porte between 22 October (3 November) 1880 and 29 January (10 February) 1881. The amount was not contested, and the Russian Embassy made formal claim for the payment at the same time that it transmitted the final decision of the commission. The Ottoman Government was unable to pay the debt immediately. It started, however, to pay it in instalments in 1884 and completed the payment in 1902. In June/July 1902, the Russian Embassy at Constantinople wrote to the Ottoman Government stating that the latter had taken more than 20 years to liquidate a debt which should have been settled immediately and, referring to previous notes containing warnings of a demand for interest on the unpaid debt, claimed compound interest totalling some 20 million francs.<sup>575</sup> The Ottoman Government replied that article V of the Peace Treaty of 1879 "did not stipulate interest and that in the light of the diplomatic negotiations that had taken place on the subject the Government had been far from expecting to see such demands formulated at the last minute by the claimants, the effect of which would be to reopen a matter which had been happily concluded".<sup>576</sup> The Russian Embassy in its reply insisted on payment of the interest-damages claimed by its subjects, adding that only the amount of the damages could be a matter for investigation. By the Special Agreement of 22 July (4 August) 1910, both Governments agreed to submit the case to the Permanent Court of Arbitration at The Hague.

390. The Russian Government based its demand upon "the responsibility of States for non-execution of pecuniary debts", which implied "the obligation to pay interest-damages and in particular the interest on the sums unwarrantedly withheld". It contended that:

... what we are concerned with here is not conventional interest, that is to say deriving from a particular stipulation ... but the obligation incumbent upon the Imperial Ottoman Government to pay moratory interest deriving from the delay in execution, in other words the partial non-execution of the Peace Treaty. It is true that the obligation arose on the occasion of the Treaty of 1879, but it derives *ex post facto* from a new and accidental cause, which is the failure of the Sublime Porte to fulfil its undertakings as it was obliged to do.<sup>577</sup>

391. The Ottoman Government, while admitting in explicit terms the general principle of the responsibility of States in the matter of the non-fulfilment of their engagements, maintained, on the contrary, that in public international law moratory interest did not exist unless expressly stipulated. It thus attempted to distinguish *compensatory interest-damages*, resulting

<sup>574</sup> *Ibid.*, p. 435.

<sup>575</sup> *Ibid.*, p. 438.

<sup>576</sup> *Ibid.*

<sup>577</sup> *Ibid.*

from an act of violence or the non-fulfilment of an obligation, from *moratory interest-damages* which were caused by delay in the fulfilment of an obligation. It refused to acknowledge the latter type of interest-damages.

392. In its award of 11 November 1912, the Court, rejecting that argument by the Ottoman Government, contended that all interest-damages were always "reparation, compensation for a fault", whatever name they might be given. Thus it was not possible for the Court to perceive essential differences between various responsibilities. "Identical in their origin, the fault," the Court said, "they are identical in their consequences, compensation in money".<sup>578</sup>

393. The Court supported, on the other hand, the argument advanced by the Ottoman Government that if Russia sent to Constantinople a regular demand for payment of the principal and interest on 31 December 1890 (12 January 1891), subsequent correspondence had shown that at the time of the payments no interest reservation appeared in the receipts given by the Russian Embassy, and the Embassy never considered the sums received as interest. It concluded that the two Governments had interpreted in the same manner the term "residue of the indemnity" to mean the amount of the balance of the principal, and that the repeated use by the Russian Government of the two expressions in the same meaning "implied the relinquishment of the right to interest or moratory interest-damages".<sup>579</sup> This brought the Court finally to conclude:

that, in principle, the Imperial Ottoman Government was bound, vis-à-vis the Imperial Russian Government, to pay moratory interest-damages from 31 December 1890 (12 January 1891), the date of the receipt of an explicit and regular formal notice, but that, in fact, the benefit of this notice having ceased for the Imperial Government of Russia as a result of the subsequent renunciation of its Embassy at Constantinople, the Ottoman Government is not now bound to pay it interest-damages because of the dates on which the payment of the compensation was made.<sup>580</sup>

394. The Ottoman Government also relied on the exception of *force majeure* to justify the delay in the payment of its debt. Rejecting the Ottoman argument on that point, the Court stated:

6. *The exception of force majeure*, invoked in the first place, is arguable in international public law, as well as in private law; international law must adapt itself to political exigencies. The Imperial Russian Government expressly admits ... that the obligation for a State to execute treaties may be weakened "if the very existence of the State is endangered, if observation of the international duty is ... self-destructive".

It is indisputable that the Sublime Porte proves, in support of the exception of *force majeure* ... that Turkey was faced between 1881 and 1902 with the gravest financial difficulties, compounded by domestic and external events (insurrections, wars), which forced it to allocate a large part of its revenues to special purposes, to submit to foreign control a part of its finances, even to grant a moratorium to the Ottoman Bank, and in general to be unable to

fulfil its obligations without delays or omissions, and only then at the cost of great sacrifices. However, it is alleged on the other hand that, during the same period and especially after the establishment of the Ottoman Bank, Turkey was able to contract loans at favourable rates, to convert others, and lastly to amortize an important part, estimated at 350 million francs, of its public debt ... It would be a manifest exaggeration to admit that the payment (or the contracting of a loan for the payment) of the relatively small sum of 6 million francs due to the Russian claimants would have imperilled the existence of the Ottoman Empire or seriously endangered its internal or external situation. *The exception of force majeure cannot therefore be accepted.*<sup>581</sup>

#### THE "CARTHAGE" CASE (*France/Italy*) (1913)

395. On 16 January 1912, during the Turko-Italian war in Africa, an Italian warship stopped the French steamer, the *Carthage*, while it was on its way from Marseilles to Tunis because it was carrying an aircraft and parts of another, which the Italians claimed were contraband of war, destined to a private consignee in Tunis. The *Carthage* was conveyed to Cagliari, where it was detained until 20 January 1912. The aircraft and parts were landed by order of the owner company and the vessel was allowed to resume its voyage. The aircraft was released on 21 January 1912 upon assurance to the Italian Government that it was intended purely for exhibition purposes and that there was no intention on the part of the owner to offer his services to the Ottoman Government. The French Government demanded reparations from the Italian Government for, among other reasons, "the moral and political injury resulting from the failure to observe international common law and conventions binding upon both Italy and France". The case was submitted to the Permanent Court of Arbitration. In its award of 6 May 1913, the Court upheld the French argument, saying, *inter alia*:

that the information possessed by the Italian authorities was of too general a nature and had too little connection with the aeroplane in question to constitute sufficient juridical reasons to believe in a hostile destination and, consequently, to justify the capture of the vessel which was transporting the aeroplane; ...<sup>582</sup>

#### THE "LINDISFARNE" CASE (*United Kingdom/United States of America*) (1913)

396. On 23 May 1900, the United States Army transport *Crook* damaged by collision the British steamship *Lindisfarne* in the harbour of New York. The *Lindisfarne* had to be repaired, which took one day. The cost of the repairs was defrayed by the United States Government, as a matter of grace. However, the British Government, on behalf of the owners of the ship, claimed an additional sum for the one day's demurrage. The United States Government denied that it was liable for demurrage on account of the injury, arguing:

<sup>578</sup> *Ibid.*, p. 440.

<sup>579</sup> *Ibid.*, p. 446.

<sup>580</sup> *Ibid.*

<sup>581</sup> *Ibid.*, p. 443.

<sup>582</sup> J. B. Scott, ed., *The Hague Court Reports* (New York, Oxford University Press, 1916), p. 334.

First, that the collision was caused through the efforts of the *Crook* to avoid running down a third vessel, and these efforts were conducted with ordinary care and maritime skill; secondly, that the collision was not the result of any negligence on the part of the officer in command of the *Crook*, either in the determination of a course of action or in the handling of the transport, and no negligence on his part can be presumed in view of his manifest duty to avoid colliding with a vessel in motion; thirdly, that the collision was in fact and in law an inevitable accident; and fourthly, that no evidence is presented on behalf of His Britannic Majesty's Government upon which a claim for demurrage can be predicated or the amount of demurrage computed; and fifthly, that the Government of the United States has never admitted any liability for the collision.<sup>583</sup>

397. The case was submitted to the Arbitral Tribunal established under the Special Agreement of 18 August 1910. In its decision of 18 June 1913, the Tribunal said that it was a universally admitted rule of maritime law, as well in the United States as elsewhere, that in case of collision between a ship under way and a ship at anchor, it rested with the ship under way to prove that it was not at fault or that the other ship was at fault. In the opinion of the Tribunal, no sufficient evidence was supplied by the United States to satisfy that rule. The Tribunal also argued that the papers submitted by the United States showed clearly that the payment for the repair was provided for by Congress on an assumption of an obligation to pay, arising out of a liability. The contention of the United States was thus rejected by the Tribunal.<sup>584</sup>

THE "EASTRY" CASE (*United Kingdom/United States of America*) (1914)

398. In June 1901, the steamship *Eastry*, a British ship owned by a British company in Liverpool, was under a time-charter to one Simmons, by whom it had been sublet to the Compañía Marítima, a company then under contract with the United States Government, to carry a cargo of coal to be delivered at Manila Bay. When it was anchored at Cavite in that bay, the *Eastry* was damaged by certain coal hulks belonging to the United States Government that came alongside to take off her cargo. Temporary repairs were made there at the expense of that Government. For all other claims, the local United States authorities referred to the War Department in Washington. Following correspondence between the owner of the ship and the War Department, the case was submitted to the Arbitral Tribunal established under the Special Agreement of 18 August 1910.

399. The United States Government contended:

... it is not liable in damages for the injuries and losses suffered by the *Eastry*, because they were due to rough seas, and because the captain alone had authority to determine the time and manner of discharging the cargo. [Furthermore], the captain of the steamer was negligent, in that he allowed the work of discharging the cargo to be proceeded with under the circumstances.<sup>585</sup>

<sup>583</sup> United Nations, *Reports of International Arbitral Awards*, vol. VI (*op. cit.*), pp. 23-24.

<sup>584</sup> *Ibid.*, p. 24.

<sup>585</sup> *Ibid.*, p. 38.

The United States further argued that the temporary repairs were made as an act of grace. In its decision of 1 May 1914, the Tribunal found the above contention contrary to the statement made a few days after the incident by the United States local authorities at Manila to the effect that "the damages were clearly the fault of the Government and ... there [was] no question as to the Government's responsibility".<sup>586</sup> As to the temporary repairs at Manila, the Tribunal found no support in the evidence to prove that they were made as an act of grace. The Tribunal declared the United States Government liable to pay for the damages.

THE CADENHEAD CASE (*United Kingdom/United States of America*) (1914)

400. On 22 July 1907, Elizabeth Cadenhead, a British subject, was shot and killed near the entrance of a fort at Sault Ste. Marie in Michigan. The shot was fired by a soldier of the United States Army garrisoned at the fort, and was aimed at a military prisoner who was escaping from his custody. The soldier acted in entire conformity with the relevant military orders and regulations.

401. In its decision of 1 May 1914, the British/American Arbitral Tribunal, established under the Special Agreement of 18 August 1910, concluded that the United States was not liable for pecuniary compensation to the Cadenhead family, which the United Kingdom claimed. It expressed, however, "the desire that the United States Government will consider favourably the payment of some compensation as an act of grace" to the family of the victim, in view of the fact that:

It may not have been altogether prudent for the United States authorities to permit prisoners under the charge of a single guard to be put to work just at the entrance of a fort on a public highway in a city, and order or authorize that guard, after allowing one of these prisoners to escape under these circumstances, to fire at him, while he was running along that highway.<sup>587</sup>

THE HOME MISSIONARY SOCIETY CASE (*United Kingdom/United States of America*) (1920)

402. An American religious body called the "Home Frontier and Foreign Missionary Society of the United Brethren in Christ" sustained damage during a rebellion of natives in 1898 in the British Protectorate of Sierra Leone. The rebellion followed upon the collection of a new tax imposed on the district. In the course of the rebellion, the property of several missions was destroyed and a number of missionaries were murdered. The United States of America contended that only inadequate forces were stationed in the vicinity of the missions at the time of the uprising and that the British Government was responsible for

<sup>586</sup> *Ibid.*

<sup>587</sup> *American Journal of International Law* (New York), vol. 8, No. 3 (July 1914), p. 665.

the losses suffered by the Society because of its neglect or failure to give proper protection. The case was referred to the British/American Arbitral Tribunal established under the Special Agreement of 18 August 1910.

403. In its decision of 18 December 1920, the Tribunal dismissed the claim, saying:

It is a well-established principle of international law that no Government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection.<sup>588</sup>

The Tribunal found no evidence to support the contention that the British Government had failed in its duty to afford adequate protection for life and property. That Government had no reason to believe that the imposition of the tax, which was a measure in accordance with general usage in colonial administration and the usual practice in African countries, would lead to a widespread and murderous revolt. The Tribunal further said that there was in the present case no lack of promptitude or courage which was alleged against the British forces in the Protectorate.

THE "JESSIE", THE "THOMAS F. BAYARD" AND THE "PESCAWHA" CASE (*United Kingdom/United States of America*) (1921)

404. On 23 June 1909, while they were legally engaged in hunting sea otters on the high seas in the North Pacific Ocean, the British sealing schooners *Jessie*, *Thomas F. Bayard* and *Pescawha* were boarded by an officer from a United States revenue cutter. The officer, having searched them for seal-skins and found none, had the firearms found on board placed under seal, entered his search in the ship's log, and ordered that the seals should not be broken while the vessels remained north of 35° north latitude, and east of 180° west longitude. The United States Government admitted that there was no agreement in force during the year 1909 specifically authorizing American officers to seal up the arms and ammunition found on board British sealing vessels, and that the action of the commander of the American revenue cutter was unauthorized by the Government. It denied, however, any liability in these cases, arguing *inter alia* that the boarding officer acted in the *bona fide* belief that he had authority so to act.

405. In its award of 2 December 1921, the British/American arbitral tribunal constituted under the Special Agreement of 18 August 1910 decided in favour of the United Kingdom, saying, *inter alia*:

It is unquestionable that the United States naval authorities acted *bona fide*, but though their *bona fides* might be invoked by the officers in explanation of their conduct to their own Government, its effect is merely to show that their conduct constituted an error in judgment, and any Government is responsible to other

Governments for errors in judgment of its officials purporting to act within the scope of their duties and vested with power to enforce their demands.<sup>589</sup>

NORWEGIAN SHIPOWNERS' CLAIMS (*Norway/United States of America*) (1922)

406. During the First World War, certain ships under construction in the United States of America for Norwegian shipowners were, by an order dated 3 August 1917, requisitioned by the United States Shipping Board Emergency Fleet Corporation as a part of war emergency measures. The Norwegian shipowners who had been deprived of their property claimed just compensation for the requisition, as well as for the delay in returning the ships to them after the war. The United States offered some \$2,679,220 for the settlement of the claims of the Norwegian shipowners which amounted to a total of \$13,223,185 (without adding interest claimed). Pursuant to a Special Agreement of 30 June 1921, an Arbitral Tribunal was constituted<sup>590</sup> in accordance with articles 87 and 59 of the Convention for the Pacific Settlement of International Disputes of 18 October 1907 (Permanent Court of Arbitration at The Hague).

407. The United States contended, *inter alia*, that no compensation should be given to the claimants in excess of that sum, because there could be no liability when the contract had been destroyed or rendered void, or delayed, in consequence of *force majeure* or "restraint of princes and rulers", which was brought into being as a result of the requisitioning order of the Emergency Fleet Corporation. In its award of 13 October 1922, the Arbitral Tribunal considered that the United States was responsible for having made a discriminatory use of the power of eminent domain towards citizens of a friendly nation and that it was liable for the damaging action of its officials and agents towards the Norwegian shipowners.<sup>591</sup>

408. The United States Government paid the sums awarded by the Arbitral Tribunal to the Norwegian Government. However, in the letter dated 26 February 1923 to the Norwegian Minister at Washington concerning the payment of the sum, the Secretary of State of the United States wrote that his Government was compelled to state that it could not accept certain apparent bases of the award as being declaratory

<sup>589</sup> United Nations, *Reports of International Arbitral Awards*, vol. VI (*op. cit.*), p. 59.

<sup>590</sup> *Ibid.*, vol. I (Sales No. 1948.V.2), p. 309.

<sup>591</sup> *Ibid.*, p. 339. Rejecting the argument of the "restraint of princes", the Tribunal stated:

"... although 'restraint of princes' may well be invoked in disputes between private citizens, it cannot be invoked by the United States against the Kingdom of Norway in defence of the claim of Norway. International law and justice are based upon the principle of equality between States. No State can exercise towards the citizens of another civilized State the 'power of eminent domain' without respecting the property of such foreign citizens or without paying just compensation as determined by an impartial tribunal, if necessary." (*Ibid.*, p. 338.)

<sup>588</sup> *Annual Digest of Public International Law Cases, 1919-1922* (London, 1932), case No. 117, p. 174.



of the law or as binding upon its Government as a precedent. Regarding the principle governing the requisitioning power of a belligerent State, the letter said:

... The award recognizes the requisitioning power of a belligerent but would seem to apply a limitation on its exercise, where the property concerned is that of neutral aliens, by defining the extent of the emergency and its termination, and by enhancing damages accordingly, thus subjecting the Government to a different test and a heavier burden where the property is owned by neutral nationals than in the case where it is owned by nationals of the requisitioning State. No such duty to discriminate in favor of neutral aliens is believed to be imposed upon a State by international law, with respect to property such as is concerned in the present case. It is the view of this Government that private property having its *situs* within the territory of a State (and the property here concerned is wholly that of private individual claimants on whose behalf the Kingdom of Norway is merely the international representative), including as in the present case property produced or created therein and never removed therefrom, is from the standpoint of international law subject to the belligerent needs of the territorial sovereign, quite regardless of the nationality of the owners, provided that in case of its requisition just compensation be made. Due process of law applied uniformly, and without discrimination to nationals and aliens alike and offering to all just terms of reparation or reimbursement suffices to meet the requirements of international law; and thus the requisitioning State is free to determine the extent and duration of its own emergency. In apparently maintaining a different principle, the Tribunal is believed to have proposed and applied an unwarranted rule, against which the Government of the United States feels obliged to protest and under which it must deny any obligation hereafter to be bound.

...<sup>592</sup>

CASE OF GERMAN REPARATIONS UNDER ARTICLE 260 OF THE TREATY OF VERSAILLES (*Reparations Commission/Germany*) (1924)

409. Certain differences having arisen as to the interpretation of terms of article 260 of the Treaty of Versailles,<sup>593</sup> a series of questions was submitted for

<sup>592</sup> *Ibid.*, p. 345.

<sup>593</sup> The text of article 260 of the Treaty of Versailles reads as follows:

"Without prejudice to the renunciation of any rights by Germany on behalf of herself or of her nationals in the other provisions of the present Treaty, the Reparations Commission may within one year from the coming into force of the present Treaty demand that the German Government become possessed of any rights and interests of German nationals in any public utility undertaking or in any concession operating in Russia, China, Turkey, Austria, Hungary and Bulgaria, or in the possessions or dependencies of these States or in any territory formerly belonging to Germany or her allies, to be ceded by Germany or her allies to any Power or to be administered by a Mandatory under the present Treaty, and may require that the German Government transfer, within six months of the date of demand, all such rights and interests and any similar rights and interests the German Government may itself possess to the Reparations Commission.

"Germany shall be responsible for indemnifying her nationals so dispossessed, and the Reparations Commission shall credit Germany, on account of sums due for reparation, with such sums in respect of the value of the transferred rights and interests as may be assessed by the Reparations Commission, and the German Government shall, within six months from the coming into force of the present Treaty, communicate to the

arbitration, under the Protocol of 30 December 1922, to a sole arbitrator, Mr. Trondhjem, who rendered his award on 3 September 1924.

410. The fifth question submitted to the arbitrator was whether the article in question applied to concessions, which, by the terms of the grant or by the law of the State granting the concession, were not transferable, such as the concession of local railways granted by the Prussian Government. While Germany contended that the article would not apply to such concessions, the Reparations Commission asked the arbitrator to:

Decide that the simple fact that a concession is not transferable according to its terms or under the law of the State granting the concession is not an obstacle to the application of article 260, and that only duly established *force majeure* can relieve the Reich of its obligation ...<sup>594</sup>

The arbitrator, although without specifically referring to *force majeure*, admitted the argument of the Commission, saying that the simple fact that a concession was declared not to be transferable was not sufficient to free Germany of its obligation under article 260 of the Treaty of Versailles. He went on to state that Germany should attempt to obtain the consent of the Government concerned, so that the concession could be transferred, and that it would be only when such consent was refused that Germany could be considered freed from its obligation.<sup>595</sup>

411. The seventh question was whether article 260 applied only to public utility undertakings the head offices of which were in the territories referred to in that article, or whether it applied also to those which had their head offices not in those territories but in some other country, Germany, for instance, although their works were in those territories. Germany contended, *inter alia*, that according to the law in force in Germany, Austria, Hungary, Bulgaria, Turkey and Russia, it was impossible to transfer by a single decree an enterprise in its entirety. It pointed out that the German Government could not force foreign authorities to effect the necessary registration for the purpose of an "*Auflassung*" [agreement of the parties for the transfer of ownership in real estate] under German law. According to the Reparations Commission, however, Germany could not for various reasons invoke that situation as a factor rendering it impossible to apply article 260.<sup>596</sup> The arbitrator concluded that, although Germany might encounter certain difficulties in effecting the transfer of property situated outside its territory, such difficulties were not in general insurmountable. He added:

It is undeniable that the rights of the States granting the concessions to retain and liquidate the property, rights and interests of German nationals are capable of greatly diminishing the effect of article 260 and that, among these, the right to retain them without

Reparations Commission all such rights and interests, whether already granted, contingent or not yet exercised, and shall renounce on behalf of itself and its nationals in favour of the Allied and Associated Powers all such rights and interests which have not been so communicated." (*Ibid.*, p. 432).

<sup>594</sup> *Ibid.*, p. 486.

<sup>595</sup> *Ibid.*

<sup>596</sup> *Ibid.*, pp. 493-494.

any term having been by the Treaty for the exercise of this right may impede the execution of the obligation imposed upon the German Government by article 260. On the other hand, it cannot be said, in the opinion of the arbitrator, that the provisions in question as a general rule prevent the execution of this obligation. Impossibility can only be accepted if the consent necessary for the transfer cannot be obtained within a reasonable period of time from the Government of the State granting the concession.<sup>597</sup>

BRITISH CLAIMS IN THE SPANISH ZONE OF MOROCCO  
(Spain/United Kingdom) (1924–1925)

412. During the years 1913 to 1921, a number of British subjects and British protected persons suffered losses and sustained injuries by acts of bandits and tribal rebels, and by military operations, in the Spanish Zone of Morocco. By the Special Agreement of 29 May 1923, Spain and the United Kingdom submitted the claims to arbitration, M. Max Huber being the sole arbitrator (rapporteur).

413. In a memorial dated 16 March 1924, the British Government contended, *inter alia*, that for a long period of time the action of the Spanish authorities in Morocco had resulted in a denial of justice to British subjects and British protégés, and added the following as the expression of the attitude customarily followed by the United Kingdom:

Where claims are made for compensation for damage done by insurgents in armed insurrection against a Government which was unable to control them, claimants should be informed that His Majesty's Government does not regard a Government as liable in such cases, unless that Government was negligent and might have prevented the damage arising or unless it pays compensation either to its own citizens or subjects or to other foreigners in similar cases, or unless the rebellion has been successful and the insurgent party has been installed in power.<sup>598</sup>

414. In a "report on the responsibility of the State in the situations evoked by the British claims", of 23 October 1924, Max Huber first discussed in general terms the responsibility – or non-responsibility – of States in situations caused by uprisings, revolts and wars, characterizing them as cases of *force majeure* and yet recognizing certain obligations of States to take preventive measures:

The fact that it is an alien who is the victim of an offence under the *ordinary law*, for example, theft or looting, does not place the event on an international plane; the same is true if the criminal prosecution to which the act is liable does not take place, and if a claim for restitution or damages and interest receives no positive and satisfactory response. No police force or administration of justice is perfect, and undoubtedly a considerable margin in which tolerance is necessary must be accepted, even in the best administered countries. But the restriction thus placed on the right of States to intervene to protect their nationals presupposes that general security in the latter's countries of residence should not fall below a certain level, and that at least their protection by justice should not become purely illusory. It is for this reason that interventions by States to obtain indemnification for their injured nationals arise most often in situations where the authorities are no longer in a position to guarantee the security that may rightly be expected.

3. It is in this connexion that the principle of the non-responsibility of States for damages caused by *popular uprisings, revolts*

and wars becomes important, for it is in precisely these cases that insecurity is particularly great and judicial protection becomes problematical. It would appear indisputable that the State is not responsible for the fact of an uprising, revolt, civil war or international war, or for the fact that these events provoke damages within its territory. It may be that it was more or less possible to show proof of errors committed by the Government, but failing specific clauses in a treaty or agreement the investigation necessary for this purpose is not acceptable. These events must be regarded as cases of *force majeure*.

But does non-responsibility for the event as such exonerate the territorial State from all responsibility? Does the simple fact that the damages sustained have a certain connexion with events of the nature of war or rebellion make it possible to rule out, by virtue of the theory of non-responsibility for those events, all consideration of the responsibility possibly incurred by the State in that respect?

Even admitting the argument that the responsibility of the State ceases altogether when there is a connexion between a damage sustained and a revolt, etc., it would still not be possible to reject a claim in that respect out of hand, for it would always be necessary first to examine and decide on a point of fact, namely the effective nexus between the two events. Furthermore, the principle of non-responsibility in no way precludes the duty to exercise a certain vigilance. Though the State is not responsible for the revolutionary events themselves, it may nevertheless be responsible for what the authorities do or do not do to mitigate the consequences as far as possible. Responsibility for the action or inaction of the public authorities is quite different from responsibility for acts that may be imputed to persons outside the control of the authorities or openly hostile to them. The principle of non-intervention in the relations between a State and the aliens established in its territory presupposes not only normal conditions of justice and administration but also the will of the State to carry out its primary purpose: the maintenance of domestic peace and social order. The State is bound to exercise a certain vigilance. Although it is the authorities of the country which decide what is to be done or left undone with a view to the suppression of a revolt, etc., a State cannot require another State, the interests of whose nationals are injured, to remain unmoved if possibilities of assistance are, for no good reason, openly neglected, or if the authorities, despite ample warning, take no preventive measures, or again, if equal protection is not afforded to aliens of all nationalities.<sup>599</sup>

415. The rapporteur then examined the responsibility for acts of plunder (*brigandage*), which he defined as pillage or theft by a main force, usually carried out by more or less organized gangs. Acts of plunder could come under the category of a common law delict or of a rebellion, according to circumstances, but there might arise a situation midway between the two. Stressing the particular importance of the question of the degree of diligence to be exercised by States in such cases, the rapporteur said:

Is the territorial State then exonerated if it has done what may reasonably be demanded of it, given its effective situation? Or is it bound to guarantee a certain degree of security, being responsible for possible inability to provide it? Such an argument has been put forward and has been applied in respect of certain States. However, it seems highly disputable that this manner of viewing the case is well-founded, and it is far from having been accepted in the decisions of international tribunals. Doctrine is clearly opposed to it. In the branch of international law in which the problem of the negligence of the State in regard to the prevention of acts possibly contrary to international law has played a particu-

<sup>597</sup> *Ibid.*, p. 498.

<sup>598</sup> *Ibid.*, vol. II (Sales No. 1949.V.I), p. 635.

<sup>599</sup> *Ibid.*, pp. 641–642.

larly important role, namely in the realm of neutrality in time of war at sea, the end result has been recognition that the State is only bound to exercise that degree of vigilance that corresponds to the means at its disposal. To demand that these means should be commensurate with the circumstances would be to impose on the State a burden which it might often be unable to support. Therefore, the argument that the vigilance to be exercised must correspond to the importance of the interests at stake could not succeed. The vigilance which the State, from the point of view of international law, is bound to ensure may be characterized, by applying by analogy a term from Roman law, as *diligentia quam in suis*. This rule, in conformity with the primary principle of the independence of States in their domestic affairs, in fact offers States, as far as their nationals are concerned, the degree of security they may reasonably expect. As soon as the vigilance exercised falls obviously short of that level in respect of the nationals of a particular foreign State, that State is entitled to regard itself as injured in respect of interests that should enjoy the protection of international law.

What has just been stated on the subject of due vigilance in relation to the general insecurity resulting from the activities of brigands applies even more strongly to the two other situations envisaged above, namely criminal offences under the ordinary law and rebellion. In the first case, vigilance pressed further than *diligentia quam in suis* would impose on the State the obligation to organize a special security service for aliens, which would certainly go beyond the bounds of recognized international obligations (apart from cases involving persons entitled by law to special protection). In the second hypothesis, that of rebellion, etc., responsibility is limited because the authorities are faced with exceptional resistance.<sup>600</sup>

Lastly, the rapporteur wrote:

... the State may incur responsibility in the situations in question, not only through a lack of vigilance in preventing injurious acts, but also through a lack of diligence in the criminal prosecution of the offenders, as well as in applying the appropriate civil penalties.<sup>601</sup>

416. The report of Max Huber on individual claims was made on 29 December 1924.

417. *Claim No. 1* involved compensation for destruction of houses, fruit trees and crops, as well as for looting of cattle, which occurred in the vicinity of Tetuan as a result of the tribal rebellion and the military operations by Spanish troops, mostly in 1913. It also included a claim for compensation for crops and rents which the claimant was unable to collect owing to the insecurity prevailing in the region. Excluding, first of all, the responsibility of the Spanish Protectorate for the damages caused by the operations of Spanish troops and the activities of the tribal soldiers, the rapporteur said:

In so far as the damages are the result either of the operations of the Spanish troops or of the warlike activity of the hostile tribes, it is established that they cannot involve responsibility on the part of the Protectorate authorities. For the reasons set out in his general note on the notion of responsibility, the Rapporteur could not examine for their expediency any political, strategical or tactical measures. Since it is recognized that the fact of the occurrence of hostilities, and even the existence of a situation of open rebellion, does not in itself result in the responsibility of the State, it must in logic be recognized that a State's absolute inability to provide normal protection for property situated in the zone of the hostilities or the rebellion also cannot create a responsibility on its part. However, this state of affairs changes as soon as the abnormal

situation resulting from the war or rebellion ceases to the extent necessary to allow the State to exercise its authority in more or less normal conditions.<sup>602</sup>

With regard to thefts by individuals, the rapporteur wrote:

The responsibility of the State for the thefts properly so-called can only exist where the culprits are soldiers: in fact, it does not emerge from the record that these thefts can be attributed to the negligence of the authorities in maintaining order and public safety, or that the way in which they engaged in restraining measures can be regarded as equivalent to a denial of justice.

The Rapporteur cannot, as a result, find responsibility on the part of the Protectorate, save in the case of item I, 22, relating to a theft attributed to soldiers of the native cavalry.<sup>603</sup>

As for the loss of crops and rents due to insecurity, the rapporteur said that it would not give rise to a claim for compensation unless it was, *inter alia*, due to "faults committed and for which the State was responsible", which he found not to have existed.<sup>604</sup>

418. *Claim No. 47* also concerned the loss of crops due to the state of insecurity between Tetuan and Tanger during the years 1913 and 1919. The rapporteur pointed out that the area in question was occupied by a tribe that was in rebellion against the Government during those years and that it was only in late 1919 that the troops of the Protectorate captured the area. He added:

... The result of this is that it was owing to the military situation and the insubordination of this part of the country to the Maghzen that the Spanish authorities found themselves prevented from protecting the private interests that are the subject of the two claims, *inter alia*.<sup>605</sup>

For this reason, the rapporteur rejected the claim.

419. *Claim No. 50* was brought by Mr. I. J. Cohen, who in 1918 had entrusted a mule driver with a pack of merchandise to be delivered to Meknès from Tanger, giving him advance payment for the transportation. The driver, however, sold the merchandise for his own profit in the town of Chechaouene. It was alleged that the Spanish authorities did not take effective action, although they promised to do so to the British Vice-Consul at Tetuan upon his intervention. The rapporteur first noted that no evidence was submitted by the British Vice-Consul to support the allegation, and went on to stress the "impossibility" of action being taken by the Spanish authorities, as follows:

But there is yet another reason for exonerating the State from responsibility in the case in point. In 1919, Chechaouene was in the unoccupied zone; it was only occupied by the Protectorate's troops in 1920. Even if a messenger from the Protectorate's authorities had been able to reach Chechaouene and to deliver to the mule driver or to the pasha the summons desired by the British authorities, there is nothing to guarantee that such action would have produced any effect. The sole fact that Chechaouene is in the Spanish zone of influence does not constitute an adequate basis on which to claim that the authorities of the Protectorate are responsible for the consequences of the impossibility of responding, in any part of this zone, to a request for judicial assistance. The

<sup>600</sup> *Ibid.*, p. 644.

<sup>601</sup> *Ibid.*, p. 645.

<sup>602</sup> *Ibid.*, pp. 652-653.

<sup>603</sup> *Ibid.*, pp. 656-657.

<sup>604</sup> *Ibid.*, p. 657.

<sup>605</sup> *Ibid.*, p. 720.

impossibility was the result of the state of insubordination in that part of the zone for which, according to the rules of international law, the Protectorate authorities were not responsible.<sup>606</sup>

The claim was rejected.

420. *Claim No. 52* concerned the damage sustained by a British company, Levy and Co., in the vicinity of Melilla. The rapporteur again rejected the claim, because the damage was caused more or less directly by the military operations which occurred in 1921 in the surroundings of Melilla. According to the rapporteur,

... The attacks presented from every point of view the aspect of an open revolt against the Maghzen, or indeed of a war against it in the identity of the Protecting Power. It is a typical example of those situations in which international law does not recognize the possibility of responsibility resting with the States against whose authority the attack is being directed. International law adopts this position regardless of the attitude of the State in respect of resistance to the revolt. Hence, it is not necessary to examine in this case to what extent the claimant's allegations regarding the errors or omissions that might be laid to the charge of the Spanish authorities are justified. The fact that the claimant obtained the "sanction" of those authorities before settling in the Melilla hinterland cannot change this in any way; in effect, such a sanction does not constitute a guarantee against the results of every political eventuality that might be envisaged in a country of colonization. Moreover, no indication has been given to prove that the "sanction" in question did include a real guarantee of security, and it is highly unlikely that this was the case. The simple fact that the authorities permitted cultivation on land in an area which they had subjugated cannot constitute a special responsibility on their part to safeguard crops in a case where the pacification achieved was later overthrown by reason of a revolt.<sup>607</sup>

THE ILOILO CASE (*United Kingdom/  
United States of America*) (1925)

421. On 12 August 1898, the United States of America and Spain agreed that the United States should "occupy and hold the city, bay and harbour of Manila, pending the conclusion of a treaty which shall determine the control, disposition, and the Government of the Philippines". On 10 December 1898, by the Peace Treaty of Paris, Spain ceded the Philippines to the United States. The Treaty provided that on the exchange of ratifications Spain should evacuate the islands. Exchange of ratifications did not take place until 11 April 1899. In the meantime, the Spanish commander at Iloilo, on the island of Panay, being pressed by Filipino insurgents, desired to evacuate the island, and communicated this desire to General Otis, the American commander at Manila. General Otis said that he was without authority to act on the suggestion. On 14 December 1898, however, the businessmen of Iloilo having requested him to occupy the place in order to preserve peace and property, he cabled to Washington asking permission to do so. The reply was received on 21 December and an expeditionary force was sent to Iloilo on 26 December. On 24 December, however, the

Spanish force evacuated Iloilo, before General Otis was able to communicate with the Spanish commander, and the place was promptly occupied by a force of Filipino insurgents. The American forces remained in the harbour on instructions from Washington, and did not land until 11 February, when it drove out the insurgents and occupied the town, but before they were driven out the insurgents had burned the town, including the property of British subjects. The corresponding claims were referred to the British/American Claims Arbitral Tribunal established under the Special Agreement of 18 August 1910.

422. The British Government contended that there was "culpable neglect" on the part of the United States authorities in, *inter alia*, two respects: (1) in the delay of a week in answering General Otis's request, so that the Spanish commander had evacuated Iloilo and the insurgents had taken control before the expedition arrived; and (2) in delaying the occupation of Iloilo after the arrival of the expedition, so that the insurgents were able to make preparations for burning the town and to do so. In its decision of 19 November 1925, the Arbitral Tribunal held as to the first point that, as between the United States and the claimants or their Government, it was a matter of discretion whether or not to intervene in Iloilo, and "no fault can be imputed because of delay in undertaking such an intervention". As to the second point, it stated that the delay was largely due to request of the businessmen, including the claimants, who had originally sought intervention but feared the town would be burned and their property destroyed if the American forces forcibly intervened. It further stated that, even if it was assumed that there was any duty toward the claimants to act promptly, in all the circumstances it could not consider that the delay was culpable. The Tribunal concluded that, considering all the circumstances, it did not think that "any culpable disregard of the interests of the claimants has been shown", and that consequently the British claim should be rejected.<sup>608</sup>

THE JANES CASE (*Mexico/United States  
of America*) (1925)

423. Byron E. Janes, an American citizen, was the superintendent of mines for the El Tigre Mining Company at El Tigre, Mexico. About 10 July 1918, he was deliberately shot and killed at this place by Pedro Carbajal, a former employee of the mining company who had been discharged. The killing took place in the view of many persons resident in the vicinity of the company's office. The local police were informed immediately of his death and arrived soon thereafter, but delayed prompt action and as a result failed to apprehend the fugitive. The United States of America contended that the Mexican authorities took no proper and adequate steps to apprehend and punish Carbajal.

<sup>606</sup> *Ibid.*, p. 722.

<sup>607</sup> *Ibid.*, pp. 727-728.

<sup>608</sup> *Ibid.*, vol. VI (*op. cit.*), pp. 158-160.

424. In its decision of 16 November 1925, the General Claims Commission, established under the General Claims Convention of 8 September 1923, upheld the United States contention and concluded that "there was clearly such a failure on the part of the Mexican authorities to take prompt and efficient action to apprehend the slayer as to warrant an award of indemnity". The Commission elaborated its reasoning in the following terms:

At times, international awards have held that, if a State shows serious lack of diligence in apprehending and/or punishing culprits, its liability is a derivative liability, assuming the character of some kind of complicity with the perpetrator himself and rendering the State responsible for the very consequences of the individual's misdemeanor. ...

... The reasons upon which such finding of complicity is usually based in cases in which a Government could not possibly have prevented the crime, is that the non-punishment must be deemed to disclose some kind of approval of what has occurred, especially so if the Government has permitted the guilty parties to escape or has remitted the punishment by granting either pardon or amnesty.

20. A reasoning based on presumed complicity may have some sound foundation in cases of non-prevention where a Government knows of an *intended* injurious crime, might have averted it, but for some reason constituting its liability did not do so. The present case is different; it is one of non-repression. Nobody contends either that the Mexican Government might have prevented the murder of Janes, or that it acted in any other form of connivance with the murderer. The international delinquency in this case is one of its own specific type, separate from the private delinquency of the culprit. The culprit is liable for having killed or murdered an American national; the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender. The culprit has transgressed the penal code of his country; the State, so far from having transgressed its own penal code (which perhaps is not even applicable to it), has transgressed a provision of international law as to State duties. The culprit can not be sentenced in criminal or civil procedure unless his guilt or intention in causing the victim's death is proved; the Government can be sentenced once the non-performance of its judicial duty is proved to amount to an international delinquency, the theories on guilt or intention in criminal and civil law not being applicable here. The damage caused by the culprit is the damage caused to Jane's relatives by Jane's death; the damage caused by the Government's negligence is the damage resulting from the non-punishment of the murderer. If the murderer had not committed his delinquency—if he had not slain Janes—Janes (but for other occurrences) would still be alive and earning a livelihood for his family; if the Government had not committed its delinquency—if it had apprehended and punished Carbajal—Janes's family would have been spared indignant neglect and would have had an opportunity of subjecting the murderer to a civil suit ... <sup>609</sup>

<sup>609</sup> *Ibid.*, vol. IV, pp. 86–87.

In the Neer case (1926), in which an American superintendent of a mine near Guanacevi, Mexico, was killed by a group of armed men, the United States argued that the Mexican authorities showed "an unwarrantable lack of diligence or an unwarrantable lack of intelligent investigation in prosecuting the culprits". The same Commission, in its decision of 15 October 1926, said that "the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency", and concluded that in that particular case no such lack of diligence or lack of intelligent investigation was found that would render Mexico liable (*ibid.*, pp. 60–62).

THE ILLINOIS CENTRAL RAILROAD CO. CASE (*Mexico/United States of America*) (1926)

425. This case was submitted to the Mexican/United States General Claims Commission under the General Claims Convention of 8 September 1923. Referring to non-performance of obligations as a basis for establishing jurisdiction, the Commission stated:

12. Non-performance of a contractual obligation may consist either in denial of the obligation itself and non-performance as a consequence of such denial or in acknowledgment of the obligation itself and non-performance notwithstanding such acknowledgment. In both cases, such non-performance may be the basis of a claim cognizable by this Commission. The fact that the debtor is a sovereign nation does not change the rule. Neither is the rule changed by the fact that the default may arise not from choice but from necessity.<sup>610</sup>

THE HOME INSURANCE CO. CASE (*Mexico/United States of America*) (1926)

426. The Home Insurance Co., an American corporation and insurer for Westfeldt Brothers of New Orleans, brought a claim against the Mexican Government in order to recover a sum it had paid to Westfeldt Brothers to indemnify them for the loss of two railroad car loads of coffee seized at Puerto México in February/March 1924 by the forces of General Turrucó, one of the supporters of the revolutionary movement launched by de la Huerta against the Government of President Obregón. The coffee was shipped to Puerto México via the National Railways of Mexico, which were operated by the Government.

427. The case was referred to the General Claims Commission established under the Convention of 8 September 1923. In its decision of 31 March 1926, the Commission first denied the liability of the Government of Mexico, as carrier, arguing that under the laws of Mexico a public carrier for hire was not liable for the loss or damage to shipments in its possession resulting from "*casos fortuitos*", which included "acts of revolutionary forces, without negligence on its part".<sup>611</sup>

428. The Commission stated also:

... Because of the cutting off of Puerto México from all mail and transportation communication with the outside world from 6 December 1923 to 2 April 1924, it was not possible for the carrier

Similarly, in the Díaz case (1926), in which a Mexican chauffeur was killed by some unknown person at San Antonio, Texas, in 1920, the Mexican Government alleged that the "lenity of the American authorities in regard to the institution of due legal process, to the discovery of the guilty party and to his punishment, [constituted] a true denial of justice, which [would be] a justification of the right of ... the mother of the man slain, and injured by the loss of her son, to demand compensation". ... The same Commission, on 16 November 1926, decided that the evidence presented did not show that there was "gross negligence on the part of the American authorities" in the matter of apprehending the person who killed Díaz, but rather showed the contrary, and disallowed the claim (*ibid.*, pp. 106–108).

<sup>610</sup> *Ibid.*, p. 25.

<sup>611</sup> *Ibid.*, p. 51.

to move the coffee to a place of greater safety or to communicate with either the shipper or the purchaser. ...<sup>612</sup>

429. The Commission then went on to discuss the duties of the Mexican Government, in its sovereign capacity, regarding the protection of the person and property of aliens within its jurisdiction. It found no failure of the Mexican Government in that respect either, indicating, *inter alia*:

The sudden launching of this revolt against the constituted powers, the defection of a large proportion of the officers and men of the Federal Army, and the great personal and political following of the leader of the revolt, made it a formidable uprising. ... [General Turrucó] succeeded in holding this territory on behalf of the revolutionists under de la Huerta and against the established authorities of the Obregón administration. Communication between Puerto México and the outside world was cut off during a period of nearly five months. In these circumstances, the Commission finds that, on the record submitted, the Government of Mexico, then under the administration of President Obregón, did not fail in the duty which in its sovereign capacity it owed to Westfeldt Brothers to protect their property.<sup>613</sup>

#### THE GARCÍA AND GARZA CASE (*Mexico/United States of America*) (1926)

430. On 8 April 1919, Concepción García, daughter of the claimants, Mexican nationals, was killed by a shot fired by an American border patrol officer while she was crossing from the American side of the Rio Grande to the Mexican side on a raft. The crossing of the river at the point was strictly forbidden by the laws of both countries. The American officer was dismissed from the military service by a court-martial. The case was brought to the President for a review and he reversed the court-martial's findings, releasing the officer from arrest and restoring him to duty. Mexico alleged that the United States of America was liable both for a wrongful killing by one of its officials and for a denial of justice.

431. The General Claims Commission established under the General Claims Convention of 8 September 1923 held, in its decision of 3 December 1926, that, although the delinquency of crossing the river was sufficiently established, the proportion between the supposed delinquency and the endangering of human life was not so established and thus the United States was obliged to pay reparation for the wrongful killing. As to the alleged denial of justice, the Commission held that there was no foundation to the claim, for the following reasons:

In order to assume such a denial, there should be convincing evidence that, put to the test of international standards, the disapproval of the sentence of the court-martial by the President acting in his judicial capacity amounted to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. None of these deficiencies appears from the record.<sup>614</sup>

<sup>612</sup> *Ibid.*

<sup>613</sup> *Ibid.*, p. 52.

<sup>614</sup> *Ibid.*, p. 123.

In the Falcón case (1926), Mexico claimed an indemnity from the United States for its soldiers' killing of Gregorio Falcón, a

#### THE SARROPOULOS CASE (*Bulgaria/Greece*) (1927)

432. The claimant, a Greek subject resident in Bulgaria, suffered damage in the course of riots directed particularly against Greek subjects. In its decision of 14 February 1927, a Greco-Bulgarian Mixed Arbitral Tribunal held that Bulgaria was in principle responsible for the damage. It said that there were certain principles—recognized by the great majority of writers, by relevant conventions and by international jurisprudence—which were non-controversial in international law and that one of those principles was that the State was responsible when riots were directed against foreigners as such or when the damage caused was the result of negligence or fault of the local authorities.<sup>615</sup>

#### THE VENABLE CASE (*Mexico/United States of America*) (1927)

433. In April 1921, the National Railways of Mexico, under government control, granted the use of its tracks to four locomotives owned by Illinois Central Railroad Company which had been leased to two American companies, the presidents of which were, respectively, the claimant Venable and one Burrowes. In July 1921, the Illinois Central, under the contract, requested the return of the locomotives. When Venable was trying to have them taken out of Mexico, a Mexican railway superintendent forbade, at Burrowes' request, his personnel to let the engineer leave Mexican territory. The four locomotives had several times been attached by the local court for the liquidation of the debts of Burrowes's company. In September 1921, at Venable's request, Burrowes's company was declared bankrupt and the attachments were consolidated for the benefit of the bankruptcy proceedings. Despite repeated demands by Venable for the release of the locomotives, they were retained in the railway yard at Monterrey until 7 September 1922. After a few months, three of them appeared to have been deprived of so many essential

Mexican citizen, who was allegedly bathing in the Rio Grande, for its failure to bring the guilty persons to trial, and for thus committing a denial of justice. The same Commission, on 16 November 1926, found that the firing under the circumstances was against American military regulations and held that the killing was a wrongful act. It added that it seemed to be "somewhat odd that the soldiers should not have been brought to trial" (*ibid.*, pp. 104–106).

In the Kling case (1930), where a party of Mexican federal soldiers fired upon a group of American employees of an oil company at Zacamixtle, State of Veracruz, who had fired their revolvers in the air at night, in fun, the same Commission decided on 8 October 1930 that, whatever excuse might be made for the action of the Mexican soldiers, their conduct must be considered to have been "indiscreet, unnecessary and unwarranted". It found that although the killing of an alien by soldiers was always a serious occurrence calling for prompt investigation, the matter was ignored at least for several years, the soldiers having been relieved by the authorities of all responsibility for it. The commission concluded that Mexico should be held responsible for the reckless conduct of the soldiers (*ibid.*, pp. 575–586).

<sup>615</sup> *Annual Digest of Public International Law, 1927–1928* (London, 1931), p. 245.

parts as to have become practically useless, and the fourth was wrecked in a collision. Meanwhile, Venable was obliged to indemnify a surety company which had secured the railroad company against losses and incurred other expenses, which together constituted the losses for which the claim was sponsored by the United States on his behalf.

434. The United States charged Mexico, *inter alia*, with direct responsibility for the action of the railway superintendent and for the destruction of the three locomotives, and with direct or indirect responsibility for the court's action. In its decision of 8 July 1927, the General Claims Commission established under the General Claims Convention of 8 September 1923 made it clear, with regard to the destruction of the three locomotives, that no "direct responsibility" of the Government was involved since the locomotives were not in the custody of Mexican officials or other persons "acting for" Mexico. The locomotives were taken into custody by the trustee (*sindico*), who was a private citizen appointed for the benefit of the plaintiff, "as representative of the creditors". However, the Commission did not rule out the "indirect responsibility" of the Government. It found that the destruction was done "not by an act of God, but by criminal acts of men" and ordered the Mexican Government to pay \$100,000.<sup>616</sup> In this respect, the Commission stated, *inter alia*:

Though the direct responsibility for what befalls such attached goods does not rest with the courts and the Government they represent, because these are not the custodians, a heavy burden of indirect responsibility lies upon them. ... Through the *interventor*, the Court could execute its control [over] the acts of the *sindico*. Through the prosecuting attorney, the Court had to be vigilant against crimes. It had to see to it that the bankruptcy proceedings went on regularly and were brought to a close within a reasonable ... time. The Court at Monterrey seems not to have realized any of these duties. At a time when everybody could see and know that the three engines were rapidly deteriorating because of theft in a most wanton form, the less excusable since it could not have been accomplished unless by using railroad machinery specially adapted for such purposes as the dismantling of locomotives, no investigations were made by any prosecuting attorney, no prosecutions were started, no account was required from the custodian appointed by the *sindico*, nor from the *sindico* himself, and nothing was done to have the bankruptcy proceedings wound up. Even if here was not wilful neglect of duty, there doubtless was an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether this insufficiency proceeded from the law or from deficient execution of the law is immaterial. The Court at Monterrey cannot plead innocence; having constrained private individuals to leave their property in the hands of others, having allowed unknown men to spoil and destroy this property, and not having taken any action whatsoever to punish the culprits, to obtain indemnification, to have the custodians removed and replaced, or to bring the bankruptcy to an end, it rendered Mexico indirectly liable for what occurred.<sup>617</sup>

435. Referring to the action of the superintendent, the Commission considered it to be without right and indicated that "direct responsibility for acts of execu-

tive officials does not depend upon the existence on their part of aggravating circumstances such as an outrage, wilful neglect of duty, etc."<sup>618</sup> As to the action of the Court, the Commission concluded that "[no] fault can be imputed to the Court, and certainly not a defective administration of justice amounting to an outrage, bad faith, wilful neglect of duty, or apparently insufficient governmental action".<sup>619</sup>

#### THE CHATTIN CASE (*Mexico/United States of America*) (1927)

436. B. E. Chattin, an American national, had been an employee of the Ferrocarril Sud-Pacífico de México since 1908. He was arrested on 9 July 1910 at Mazatlán, Sinaloa, on a charge of embezzlement, was tried there in January 1911, convicted on 6 February 1911, and sentenced to two years' imprisonment. He was, however, released from the gaol at Mazatlán in May or June 1911 as a consequence of disturbances caused by the Madero revolution. It was alleged, *inter alia*, that his trial and the sentence were illegal, and that therefore he was entitled to an indemnity from Mexico.

437. On 23 July 1927, the General Claims Commission, established under the General Claims Convention of 8 September 1923, decided that the treatment of Chattin by the Mexican judiciary amounted "to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action recognizable by every unbiased man". It continued:

Irregularity of court proceedings is proved with reference to absence of proper investigations, insufficiency of confrontations, withholding from the accused the opportunity to know all the charges brought against him, undue delay in the proceedings, making the hearings in open court a mere formality, and a continued absence of seriousness on the part of the Court ... Intentional severity of the punishment is proved, without its being shown that the explanation is to be found in the unfairmindedness of the Judge.<sup>620</sup>

438. In its decision, the Commission distinguished between direct and indirect government responsibility. It further discussed the relevance of that distinction in connexion with the determination of "wilful negligence" as follows:

In cases of direct responsibility, insufficiency of governmental action entailing liability is not limited to flagrant cases, such as cases of bad faith or wilful neglect of duty. So, at least, it is for the non-judicial branches of government. Acts of the *judiciary*, entailing either direct responsibility or indirect liability (the latter called denial of justice, proper), are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man. Acts of the executive and legislative branches, on the contrary, share this [characteristic only] when they engender a so-called *indirect* liability in connection with acts of others; and the very reason why this type of act is often covered by the same term, "denial of justice", in its broader sense, may be partly ... that to such acts

<sup>616</sup> United Nations, *Reports of International Arbitral Awards*, vol. IV (Sales No. 1951.V.1), p. 230.

<sup>617</sup> *Ibid.*, p. 229.

<sup>618</sup> *Ibid.*, p. 224.

<sup>619</sup> *Ibid.*, p. 226.

<sup>620</sup> *Ibid.*, p. 295.



or inactivities of the executive and legislative branches engendering *indirect* liability, the rule applies that a Government cannot be held responsible for them unless the wrong done amounts to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. With reference to *direct* liability for acts of the executive, [the position] is different.<sup>621</sup>

#### THE NAULILAA CASE (*Germany/Portugal*) (1928)

439. On 19 October 1914, before Germany and Portugal had entered into a state of war, firing broke out at Naulilaa in the frontier region of African Portuguese territory between a German contingent from German South-West Africa and members of a Portuguese frontier force. As a result, one German official and two German officers were killed and two other Germans were wounded and interned. After examination of the facts, the Arbitral Tribunal, established pursuant to paragraph 4 of the annex to articles 297 and 298 of the Treaty of Versailles, found in its award of 31 July 1928 that the incident had "a clearly fortuitous character",<sup>622</sup> having been caused by a series of misunderstandings due to the incompetence of the German interpreter, by a certain imprudence on the part of the German official, and by certain unfortunate acts which were perhaps misinterpreted and which caused the Portuguese officer to give the order to fire in self-defence. The Tribunal concluded:

The incident at Naulilaa was not the consequence of acts contrary to international law that can be imputed to the German or Portuguese civil or military organs. In particular, any calculated penetration of Portuguese territory, on the part of the Schultze-Jena mission, for the clandestine purpose of starting or preparing for an invasion, or any premeditated intention on the part of the Portuguese military authorities of the region to entice the German contingent to Naulilaa with a view to destroying or capturing it, must be excluded.<sup>623</sup>

#### THE SOLIS CASE (*Mexico/United States of America*) (1928)

440. G. L. Solis, an American citizen, brought a claim against the Government of Mexico to obtain compensation for cattle which had been taken by Mexican soldiers from his ranch in the State of Tamaulipas, Mexico, in 1924. The claim consisted of two items, one for cattle alleged to have been taken by de la Huerta revolutionary forces, and the other for cattle alleged to have been taken by Mexican federal forces. The case was considered by the General Claims Commission established under the Convention of 8 September 1923, as extended by the Convention of 16 August 1927.

441. In its decision of 3 October 1928, the Commission dismissed the first item. It relied heavily on

the decision rendered on 18 August 1910 by the Anglo-American Arbitral Tribunal, which dealt with the Home Missionary Society case,<sup>624</sup> stressing the unexpected character of the uprising, as well as the lack of capacity on the part of the local authorities to give protection in vast unsettled regions. The Commission added in this respect:

It will be seen that, in dealing with the question of responsibility for acts of insurgents, two pertinent points have been stressed, namely, the capacity to give protection, and the disposition of authorities to employ proper, available measures to do so. Irrespective of the facts of any given case, the character and extent of an insurrectionary movement must be an important factor in relation to the question of power to give protection.<sup>625</sup>

As for the loss resulting from action by the federal forces, the Commission admitted the claim for the value of the cattle taken.

#### THE COLEMAN CASE (*Mexico/United States of America*) (1928)

442. It was alleged that on 4 June 1924, while the claimant, Bond Coleman, an American geologist, was engaged in geological surveys and investigation with three other men near Villa Hermosa, in Tabasco (Mexico), he was attacked by a band of armed supporters of de la Huerta. As a result a bullet was lodged in his left wrist. Moreover, the band robbed them of their equipment and pack mules. Coleman was given medical treatment at Villa Hermosa and then sent to Galveston, Texas, and later to Kansas City for further medical attention. It was further alleged that, in spite of the seriousness of the claimant's injury and the fact that his employers had chartered a boat and sent it to Villa Hermosa for the purpose of taking the claimant to Galveston, General González, federal commander in charge at Villa Hermosa and vicinity, detained the boat for a period of three days for the purpose of transporting his troops and equipment. As a consequence of the delay, the wound in the claimant's wrist became infected, causing further pain, suffering and damage.

443. In a decision of 3 October 1928, the General Claims Commission established under the General Claims Convention of 8 September 1923, as extended by the Convention of 16 August 1927, held that the Mexican Government was responsible for action of General González in seizing the boat, for the following reasons:

... It is unnecessary to consider any legal questions with respect to the right of military authorities to requisition, conformably to law and on the payment of proper compensation, a vessel that may be needed for public purposes. This ship was seized without compensation, and, at a time when the dictates of humanity should have prompted assistance to the claimant, measures taken for his relief were frustrated. No imperative necessity for taking the boat has been shown.<sup>626</sup>

<sup>621</sup> *Ibid.*, pp. 286–287.

<sup>622</sup> *Ibid.*, vol. II (*op. cit.*), p. 1025.

<sup>623</sup> *Ibid.*

<sup>624</sup> See paras. 402–403 above.

<sup>625</sup> United Nations, *Reports of International Arbitral Awards*, vol. IV (*op. cit.*), p. 362.

<sup>626</sup> *Ibid.*, p. 367.

444. As to the alleged failure of the Mexican authorities to prosecute and punish the wrongdoers, the Commission recalled that, in the opinion rendered in the claim of G. L. Solis it was emphasized that "in considering the question account must be taken of the capacity to give protection, and the disposition of the authorities to employ proper measures to do so, and that in the absence of convincing evidence of negligence, responsibility could not be established".<sup>627</sup> It further noted that Mexico, despite the broad denial of complete non-responsibility for acts of insurgents made in the initial answer and brief, explained in the course of oral argument that "a Government might be held responsible for acts of insurgents, when it was chargeable with negligence".<sup>628</sup>

THE BOYD CASE (*Mexico/United States of America*) (1928)

445. In August 1921, a group of men, consisting of Bennett Boyd, an American citizen, and others, while taking part in a round-up of the cattle belonging to a ranch in Chihuahua, Mexico, were attacked by a party of several bandits. During an exchange of shooting, Boyd was killed. The father of the victim brought a claim against the Mexican Government based upon alleged failure on the part of the Government to afford due protection to the residents of the district in question and to take appropriate steps with a view to apprehending the murderers.

446. The claim was referred to the General Claims Commission established under the Convention of 8 September 1923, as extended by the Convention of 16 August 1927. In its decision of 12 October 1928, the Commission dismissed the first part of the claim, arguing that, although the civil authorities nearest to the ranch were about 50 miles away, and the only military garrisons in the district were those about 70 miles away, those facts were not sufficient to establish a responsibility for lack of protection by the Government, since the district was "sparsely populated" and apparently no complaint of lack of protection had ever been made to the Government by the residents of the district. With regard to the second point, the Commission declared that, despite the fact that some efforts had been made by the Mexican authorities to apprehend the murderers, they could not be considered as a fulfilment of the duty devolving upon Mexico to take appropriate steps for that purpose. It pointed out particularly that the pursuit of the bandits was commenced only several days after the authorities had been informed about the crime and that negligence was clearly evidenced by the fact that orders for the arrest of a suspect issued in August 1921 were not sent to judges before February 1922.<sup>629</sup>

<sup>627</sup> *Ibid.*, p. 366.

<sup>628</sup> *Ibid.*, pp. 366-367.

<sup>629</sup> *Ibid.*, pp. 380-381. Similar issues to those in the present case were raised before the same Commission in the Smith case (1929), in which two American workers at a mine in the State of

THE CANAHL CASE (*Mexico/United States of America*) (1928)

447. In June 1915, Gilbert T. Canahl, an American citizen, was killed by a group of persons who were engaged in a violent quarrel at a dance given at San Diego mine, in the state of San Luis Potosí, Mexico. It was alleged that, despite the immediate bringing of the fact to the attention of the local authorities, they were "dilatatory in their efforts to apprehend the persons responsible" for the death and that those persons had not been punished for the crime. In the General Claims Commission established under the Convention of 8 September 1923, as extended by the Convention of 16 August 1927, the Mexican agent denied any responsibility on the part of Mexico for the unfortunate death of Canahl, arguing, *inter alia*, "that disturbed conditions in the locality in question, due to a state of warfare, prevented the local authorities from acting, Francisco Villa, in arms against the Carranza Government, controlling at that time the State of San Luis Potosí".

448. The Commission, in its decision of 15 October 1928, said that, as far as the period immediately following the crime was concerned, there was no evidence "on which to predicate a complaint of serious neglect", in view of the arrest of some suspects. As to the alleged subsequent inaction by the local authorities, the Commission said:

... The change of authority due to internecine disturbances may seriously interfere with the discharge of governmental functions, and doubtless the Commission may well take account of a situation of this kind in considering a complaint against lax administration of justice. But assuredly the authorities responsible for law and order in a community could not properly ignore a murder just because it had been committed three weeks before rebel forces were driven from the locality in which the murder took place ...<sup>630</sup>

The Commission found in favour of the claimant, although in fixing the amount of indemnities it took account of "the difficulties attending the administration of justice owing to the revolutionary disturbances".<sup>631</sup>

Chihuahua were murdered by a Mexican labourer in September 1921. In its decision of 10 April 1929, the Commission noted the American Consul's statement that the officials had "used all of the limited means at their command" to locate the criminal, and concluded:

"In view hereof, and taking into consideration the sparsely settled character of the region where the murder was committed, the Commission is of the opinion that the evidence submitted is insufficient to establish an international delinquency on the part of Mexico in the present case ..." (*ibid.*, p. 469).

In the Mead case (1930), considered by the same Commission, Mexico again invoked "the sparsely settled condition of the locality", in order to justify lack of protection by the local authorities in connexion with the alleged murder of an American employee of a mining company in the State of Zacatecas in 1923. The Commission admitted in its decision of 29 October 1930 that "there was evidence of unusual difficulties confronting the authorities in the region in question", in view of the remoteness of the mine, and that there was also evidence showing that the local authorities "were not totally indifferent with respect to their duties to endeavour to give suitable protection". It rejected the charge of non-protection put forward by the United States (*ibid.*, p. 655).

<sup>630</sup> *Ibid.*, p. 391.

<sup>631</sup> *Ibid.*

THE PINSON CASE (*France/Mexico*) (1928)

449. Georges Pinson, a French citizen, brought a claim against the Mexican Government for the damages sustained when his estate at Coyoacán, Mexico, was plundered by forces of General Carranza. He was accused of having been a supporter of the revolutionary forces of General Zapata. The case was referred to the French/Mexican Claims Commission established under the Convention of 25 September 1924, as extended by the Convention of 12 March 1927.

450. In its decision of 19 October 1928, the Commission first dealt with the question of defining the character of the forces belonging to General Carranza, concluding that the situation was a battle between contending revolutionary forces in which the victory eventually went to the Carranza forces. Turning then to the question of responsibility under international law for acts of revolutionaries, the Commission appeared to support the Mexican Government's contention that "contemporary positive international law does not yet recognize in general the obligation to grant foreign nationals the privilege of being able to claim compensation for losses and damages they may have suffered as a result of insurrections, riots, civil wars, etc."<sup>632</sup> The Commission, however, added the following:

On the other hand, if the damages originated, for example, in requisitioning or in the levying of forced contributions on the part of the lawful Government in its fight against the insurgents, or by the revolutionaries before their ultimate victory, or had been caused by wrongful acts of the lawful Government or of its military forces, or by offences committed by the victorious revolutionary forces, the responsibility of the State could not, in my opinion, be denied ...<sup>633</sup>

451. The Commission nevertheless found these general principles not applicable to the case, since under the *compromis* it was specifically asked to decide in accordance with the principles of equity. It concluded that the Mexican Government was responsible for the damages done not only by the Carranza forces but also by the Zapatist forces.<sup>634</sup>

THE CAIRE CASE (*France/Mexico*) (1929)

452. In December 1914, a commander and two other soldiers belonging to the brigade of General Tomás Urbina of the North Division, occupying at that time the city of Mexico, demanded \$5,000 in gold from Jean-Baptiste Caire, a French citizen staying in Mexico. After refusing the demand, Caire was taken by the commander and another captain from the same brigade to the barracks, and shot to death. France claimed an indemnity of \$75,000 against

Mexico for Caire's assassination. It was argued for Mexico that the military unit to which the soldiers in question belonged, would not fall under "forces" enumerated in the *compromis*; that in any case it was not established that the competent authorities had failed to take reasonable measures to repress the insurrections or acts of brigands or to punish the criminals, or were in any other manner at fault; and that even if the criminals were considered to belong to the "forces of the *de facto* Government" or the "revolutionary forces" enumerated in the *compromis*, Mexico would not be held responsible, because, *inter alia*, the criminals were merely isolated soldiers and were acting not only without the knowledge of the chief of the troops but in violation of an express order.

453. The case was referred to the French/Mexican Claims Commission established under the Convention of 25 September 1924. In its decision of 7 June 1929, concurred in by the French Commissioner, the Presiding Commissioner pointed out that the "North Division" was at that time not distinguishable from the "Liberation Army" of Emiliano Zapata and therefore the assassination should be attributed to the revolutionary forces, which were opposed to those which later became the *de jure* Government. Under the French-Mexican Convention, Mexico assumed responsibility for the damages caused by such revolutionary forces as well. As for the responsibility of Mexico for the acts of isolated soldiers acting against the will of their superiors, the Commission pointed out the special character of military officials and then discussed the theory of "objective responsibility". In this connexion, the Presiding Commissioner said:

Without going here into an examination of the question whether these new ideas, perhaps too absolute, may not need certain corrections, for example in the sense indicated by Dr. Karl Strupp, I regard them in any case as perfectly correct, in so far as they tend to make the State, in international matters, responsible for all the acts committed by its officials or organs which constitute wrongful acts from the point of view of the law of nations, regardless of whether the official or the organ in question acted within the limits of his or its competence or exceeded them. As Mr. Bourquin rightly says, "it is unanimously accepted that acts committed by the officials and agents of the State engage its international responsibility, even if the author had no competence to perform them. Justification for this responsibility does not lie in general principles, by which I mean those which govern the juridical organization of the State. In fact, the act of an official is only legally elevated into an act of State if it falls within his sphere of competence. The act of an official who is not competent is not an act of State. Therefore it should not, in principle, affect the State's responsibility. If we admit, in international law, that it is otherwise, it is for a reason proper to the machinery of international life; it is because it is felt that international relations would become too difficult, too complicated and too uncertain if foreign States were obliged to take into account the legal provisions, often very complicated, that fix spheres of competence within a State. Thus, it is obvious that, in the hypothetical case considered, the international responsibility of the State is purely *objective* in character and is based on the notion of a *guarantee*, in which the subjective notion of fault plays no part.

But in order for this (so-called objective) responsibility of the State for the acts committed by its officials or organs outside their

<sup>632</sup> *Ibid.*, vol. V (Sales No. 1952.V.3), p. 352.

<sup>633</sup> *Ibid.*, p. 353.

<sup>634</sup> Article 3 (2) of the *compromis* stipulated the recognition of claims against Mexico arising out of losses or damage caused by "the revolutionary forces, which, following their victory, established *de jure* or *de facto* governments, or by the revolutionary forces which has opposed them" (*ibid.*, p. 314).

sphere of competence to be accepted they must have acted at least apparently as competent officials or organs, or else, in so acting, they must have used powers or means proper to their official status...<sup>635</sup> Applying the general principle discussed above to the present case, the Presiding Commissioner concluded that "... there remains no doubt that the two officers, even if they were thought to have acted beyond their competence, which is by no means certain, and even if their superior officers gave a counter-order, did engage the responsibility of the State, acting under cover of their status as officers and using means made available to them as such."<sup>636</sup>

#### THE HOFF CASE (*Mexico/United States of America*) (1929)

454. An American Schooner, the *Rebecca*, left a port near Morgan City, Louisiana, in January 1884, loaded with a cargo destined for Brazos Santiago, Texas, and a consignment for Tampico, Mexico. It was alleged that when it reached a point off Brazos Santiago the wind and the tide were so high that it was driven to the southward until it found itself off the port of Tampico in a disabled and unsafe condition. The master, realizing the dangerous condition of the vessel, entered the port of Tampico, presented to the Mexican Customs official the manifesto for the goods, and lodged a statement of distress with the American Consul at that port. The Mexican Customs officials, however, seized the cargo destined for Texas and arrested the master on a charge of attempt to smuggle. The *Rebecca* and its cargo were afterwards sold by order of court.

455. The administrator of the estate of the owner of the *Rebecca*, K. A. Hoff, brought a claim against the Mexican Government and the case was referred to the General Claims Commission established under the Convention of 8 September 1923, as extended by the Convention of 16 August 1927. The United States contended that the decision of the judge in condemning the vessel and cargo was at variance with Mexican law and that the vessel, having entered Tampico in distress, was immune from the local jurisdiction as regards the administration of the local Customs laws. On behalf of Mexico, it was argued, *inter alia*, that the judge properly applied the local law and that at the time of the incident there existed no rule of international law regarding distress, and that even if there was such a rule it could not apply to the present case.

456. In its decision of 2 April 1929, the Commission said that recognition had been given to the immunity of a ship whose presence in territorial waters was due to "a superior force" and that the principles with respect to the status of a vessel in "distress" found recognition both in domestic laws and in international law. It went on to argue:

The enlightened principle of comity which exempts a merchant vessel, at least to a certain extent, from the operation of local laws has been generally stated to apply to vessels forced into port by storm, or compelled to seek refuge for vital repairs or for provi-

oning, or carried into port by mutineers. It has also been asserted in defence of a charge of attempted breach of blockade. It was asserted by as early a writer as Vattel (*The Law of Nations*, p. 128). In the [present] case we are concerned simply with distress said to have been occasioned by violent weather.<sup>637</sup>

The Commission further discussed the question of the "degree of necessity" prompting vessels to seek refuge, as follows:

It has been said that the necessity must be urgent. It seems possible to formulate certain reasonably concrete criteria applicable and controlling in the [present] case. Assuredly, a ship floundering in distress resulting either from the weather or from other causes affecting management of the vessel, need not be in such a condition that it is dashed helplessly on the shore or against rocks before a claim of distress can properly be invoked in its behalf. The fact that it may be able to come into port under its own power can obviously not be cited as conclusive evidence that the plea is unjustifiable. If a captain delayed seeking refuge until his ship was wrecked, obviously he would not be using his best judgment with a view to the preservation of the ship, the cargo and the lives of people on board. Clearly, an important consideration may be the determination of the question whether there is any evidence in a given case of a fraudulent attempt to circumvent local laws. And even in the absence of any such attempt, it can probably be correctly said that a mere matter of convenience in making repairs or in avoiding a measure of difficulty in navigation can not justify a disregard of local laws.<sup>638</sup>

Applying the above general rules to the present case, the Commission concluded:

The *Rebecca* did sail into Tampico, as observed by the judge who condemned the vessel, under its own power. However, it did not enter the port until after it had for three days, in a crippled condition, been contending with a storm in an attempt to enter the port at Brazos Santiago, Texas. It is therefore certain that the vessel did not by choice abandon its attempt to make port at that place, but only because according to the best judgment of the captain and his crew absolute necessity so required. In such a case, a captain's judgment would scarcely seem subject to question. It may also be concluded from the evidence in the case that a well grounded apprehension of the loss of the vessel and cargo and persons on board prompted the captain to turn south towards Tampico...<sup>639</sup>

#### THE ANDRESEN CASE (*Germany/Mexico*) (1930)

457. One of the claims decided by the German/Mexican Mixed Claims Commission, pursuant to the Convention of 16 March 1925, was that of Juan Andresen, a German citizen. Andresen claimed damages for the loss of 240 bales of *raíz de zacatón* consigned to a party in Mexico City and shipped on a railroad car which was destroyed by fire on 10 February 1916 at Estación de Empalme González, Guanajuato. The German agent alleged that the conflagration was caused by bonfires, negligently built too near the freight cars by troops for which Mexico was responsible, while the Mexican agent urged that the fire was "the result of a fortuitous case" and that there was "lack of care" on the part of the claimant "in accepting the shipment of the merchandise on a

<sup>635</sup> United Nations, *Reports of International Arbitral Awards*, vol. V (*op. cit.*), pp. 529-530.

<sup>636</sup> *Ibid.*, p. 531.

<sup>637</sup> *Ibid.*, vol. IV (*op. cit.*), p. 447.

<sup>638</sup> *Ibid.*

<sup>639</sup> *Ibid.*, pp. 447-448.

car which was inadequate for such a purpose". In dismissing this portion of the claim, the President of the Commission, Miguel Cruchaga, said:

Respecting the first point of the claim, that is the burning of a car containing merchandise which occurred at Estación de Empalme González on 10 February 1916, it does not appear from the proceedings that the damage was due to an act of revolutionary forces which would entail liability on the part of the Government of Mexico; and from the facts furnished it may be inferred that this is a fortuitous case in which there existed, on the one hand the carelessness of the soldiers camped at that place and on the other hand, the lack of care of the claimant in accepting the shipment of merchandise on a car which was inadequate for the purpose.<sup>640</sup>

THE EAST CASE (*Mexico/United States of America*) (1930)

458. On 16 September 1913, Victor W. East, an American citizen residing in the State of Campeche (Mexico) as the manager of the International Lumber and Development Company, gave a party in celebration of the Mexican national holiday. During the course of the party, a personal dispute occurred between East and one Pereyra, who struck East on the head and inflicted injuries on him. East was taken to his home and died the following day. The local justice of the peace immediately made a preliminary investigation and the case was taken up on 29 September by the judge of the criminal court at Campeche. Pereyra was formally committed to prison on a charge of inflicting physical injuries. Upon the death of the trial judge on 10 November, his successor, after receiving the report of a new autopsy, revoked the former commitment against Pereyra and on 7 January 1914 issued another commitment on a charge of homicide. An appeal against this commitment was granted and the proceedings were continued, but Pereyra was not rearrested. From 14 April 1914 until 4 August 1917, it did not appear that any further steps were taken in the proceedings. On the latter date, it was discovered that the record of the case was "misaid". Pereyra apparently died on 14 March 1917.

459. In its decision of 24 October 1930, the Mexico/United States General Claims Commission, established under the General Claims Convention of 8 September 1923, as amended by the Convention of 2 September 1929, while admitting that there had been internal disturbances and difficulties, did not consider them sufficient to justify the conclusion that there was a complete paralysis of all justice in one of the federal entities of the Republic. It held that the prosecution of Pereyra "was conducted negligently, with the result that he was never punished for the crime he committed", and it constituted a denial of justice.<sup>641</sup>

<sup>640</sup> M. Whiteman, *Damages in International Law* (Washington, D.C., U.S. Government Printing Office, 1937), vol. I, p. 217.

<sup>641</sup> United Nations, *Reports of International Arbitral Awards*, vol. IV (*op. cit.*), pp. 646-650.

THE MEXICO CITY BOMBARDMENT CASE (*Mexico/United Kingdom*) (1930)

460. The British Government joined in a single memorial one group of similar claims and two individual claims. In the group claims, i.e., the claims of Baker *et al.*, four British citizens suffered losses of their personal property while they were staying in the YMCA hostel in Mexico City, owing to looting by the revolutionary troops belonging to the forces of General Felix Díaz, which occupied the hostel on 11 February 1913. The forces of General Felix Díaz were at the time in arms against the administration of President Madero and occupied the hostel during the period known as "the tragic ten days". The case was referred to the British/Mexican Claims Commission established under the Convention of 19 November 1926.

461. The decision of the Commission of 15 February 1930, stated that, in the opinion of the majority of the Commission, the forces in question were rebels against the *de jure* Government, and the Mexican Government should be held responsible for the looting by them, since "the competent authorities omitted to take reasonable measures to suppress the insurrections, risings, ... in question or to punish those responsible ...". The Commission said in this connexion that the occupying and the looting of the building must have been known to the authorities and that there was no evidence at all that the soldiers who looted the hostel had been prosecuted.<sup>642</sup>

THE BARTLETT CASE (*Mexico/United Kingdom*) (1931)

462. James Bartlett, a British subject, brought a claim against the Government of Mexico for damage allegedly sustained to his property at Alamo, Lower California. It was alleged that in March 1911 a band of Mexican rebels invaded his store and took cash and articles, destroyed parts of the property and forced him to board some of the rebels for one month. The claim was taken up by the British/Mexican Claims Commission established under the Convention of 19 November 1926, as extended by the Convention of 5 December 1930. The Mexican agent argued, *inter alia*, that the alleged facts could not

<sup>642</sup> *Ibid.*, vol. V (Sales No. 1952.V.3), pp. 76-81. The same Commission reached a similar conclusion to this case in the *Santa Gertrudis Jute Mills Company case* (1930), decided on 15 February 1930. The Jute Mills Company lost part of its jute, which was being shipped via the Mexican Railway, owing to an attack on an important station by the rebel force of General Higinio Aguilar. The Commission said that the attack on the station of one of the main railroads of the country, and the destroying by fire of several wagons, were facts "which must have been of public notoriety and were sure to come at once to the knowledge of the authorities". In view of the vital importance of the railway in question, it was to be expected that measures would have been taken to prevent acts of that kind. The Commission also pointed out that the authors of the acts were known at the time of their occurrence and therefore a prosecution would have been possible. Since Mexico failed to prove otherwise, the Commission held that that Government was responsible for the damage suffered by the company (*ibid.*, pp. 108-115).

give rise to a claim, because they were committed by bandits and because it had not been shown that the Government of Mexico was negligent. He contended that there was no evidence of negligence on the part of the Government, since Alamo was "a place difficult of access from the rest of the Republic and more especially from the City of Mexico, where the seat of Government is situated".<sup>643</sup> The Commission decided in favour of Mexico on 13 May 1931, stating:

..., no negligence on the part of Mexico in suppressing the filibustering acts that took place at Alamo, Lower California, has been proved, as in view of the great distance and difficult communications it was impossible for the Government to have done more than it did, in driving out and punishing the filibusters one month after the invasion.<sup>644</sup>

#### THE GILL CASE (*Mexico/United Kingdom*) (1931)

463. John Gill, a British engineer employed by the Sultepec Electric Light and Power Co. at San Simono, Mexico, resided in a house near the power plant when the latter was attacked by revolutionary forces opposing the Madero Government on 1 September 1912. A considerable amount of personal property was reported as taken or destroyed by the revolutionaries. A claim against the Mexican Government was referred to the British/Mexican Claims Commission established under the Convention of 19 November 1926, as extended by the Convention of 5 December 1930. In its decision of 19 May 1931, the Commission stated:

The majority fully realize that there may be a number of cases, in which absence of action is not due to negligence or omission but to the impossibility of taking immediate and decisive measures, in which every Government may temporarily find [itself], when confronted with a situation of a very sudden nature. They are also aware that authorities cannot be blamed for omission or negligence when the action taken by them has not resulted in the *entire* suppression of the insurrections, risings, riots or acts of brigandage, or has not led to the punishment of *all* the individuals responsible. In those cases, no responsibility will be admitted. But in this case, nothing of the kind has been alleged. The highest authorities in the country were officially acquainted with what had occurred. They stated that they were touched by the account. They added that they had, as regarded compensation, to consider that the precedent might have grave consequences, but the Mexican agent has not shown a single proof that any action to inquire, suppress or prosecute was taken, although Sultepec is within easy distance of the capital ...<sup>645</sup>

The Commission held that in the circumstances of the case the Mexican Government was obliged to compensate for the loss sustained by Gill.

#### THE BUCKINGHAM CASE (*Mexico/United Kingdom*) (1931)

464. H. W. T. Buckingham, a British subject employed as superintendent of an oil exploration and exploitation camp of the Mexican petroleum com-

<sup>643</sup> *Ibid.*, p. 152.

<sup>644</sup> *Ibid.*

<sup>645</sup> *Ibid.*, p. 159.

pany El Aguila, S.A., in the District of Nanchital, was killed in March 1917, by armed bandits after being robbed. The British Government brought a claim on behalf of Mrs. Buckingham before the British/Mexican Claims Commission established under the Convention of 19 November 1926, as extended by the Convention of 5 December 1930. It charged that, in spite of the fact that the Mexican Government had been aware of a previous raid against the camp and of the possibility of repetitions of such raids, no effort had been made to afford protection to the company or its employees.

465. In its decision of 3 August 1931, the Commission denied the existence of failure on the part of the Mexican Government concerning the suppression of such acts of violence or the punishment of their authors, since the remote area in question was under control of rebel forces. It argued as follows:

No Government of a country of the immense extent of the Mexican Republic, with scarce population, of a mountainous character and with great difficulty of communications, can be expected to furnish adequate military protection to all the isolated oil-fields, mines, haciendas and factories scattered over the territory. The oil camp where the murder was committed is in a very remote situation, and its connexions with the rest of the country are scarce and arduous.

At the time of the events, the district was controlled by the rebel leader Cástulo Pérez, for whose protection against bandits and robbers a contribution was paid by the Aguila, as well as by other concerns. It was this leader who pursued the murderers and had them executed. It was outside the power of the Government forces to operate in the region, which was practically in the hands of others, who were superior in number, and therefore they cannot be blamed for not having punished the criminals.<sup>646</sup>

Nevertheless, the Commission considered that

... it is the duty of any Government to know the extent to which they can afford protection, and to warn subjects, as well as aliens, if they are unable to do so, leaving it to their judgment either to remain at their own risk or to withdraw from those isolated places, to where the hand of government does not reach. ...<sup>647</sup>

On this point, the Commission noted that, despite the fact that the government authorities had promised the company, after the first raid, to take protective measures, such assurance had not been followed up by any action susceptible of preventing the repetition of the occurrences. On that account, it held the Mexican Government liable.

#### THE SALEM CASE (*Egypt/United States of America*) (1932)

466. George Salem, born in Egypt in 1883, obtained American citizenship in 1908. In the following year, Salem returned to Egypt with an American passport. He visited the United States a few times thereafter, in order to have his passport renewed, until the outbreak of the First World War hindered him from making further journeys there. In 1915, when he was mixed up in criminal proceedings, the Ameri-

<sup>646</sup> *Ibid.*, p. 288.

<sup>647</sup> *Ibid.*

can agent at Cairo stated that Salem was "not now registered ... as an American citizen, or entitled to the protection of the United States", and his passport was duly cancelled by the agent. In 1917, he was charged with forging a deed and criminal proceedings were brought against him in a local court. While the case was pending, he managed to visit the United States again and in September 1919 the State Department granted him a new American passport. He returned then to Egypt and applied for discontinuance of the proceedings on the ground of non-jurisdiction due to his American citizenship. In February 1921, the American consular official at Cairo confirmed to the Egyptian authorities that George Salem was regarded as an American citizen entitled to the full protection of the Consulate, and that he had enjoyed that status without interruption since 1908, the date of his naturalization. The local court then declared lack of jurisdiction, owing to the capitulation agreement between the two countries.

467. George Salem then put forward a claim against the Egyptian Government for damages which he had sustained due to the criminal proceedings initiated against him. He brought an action before the Mixed Court at Cairo. The Court dismissed the action in March 1924 on the basis of the argument that in accordance with the regulations of the civil law the Minister of Justice could not be held responsible for mistakes made by the judicial authorities. The Mixed Court of Appeal, to which the case was referred, declared the appeal without foundation and confirmed the judgment of the lower court. The case was finally referred to arbitration under the Egypt-United States Agreement of 20 January 1931. In the award of 8 June 1932, the majority of the arbitrators rejected the American claim, saying that Egypt was "not liable under the principles of law and equity" in damages to the United States. It was pointed out, *inter alia*, that the law courts, as well as the administrative authorities of Egypt, from the moment the permanent status of Salem was clearly established by the American Government, had "done everything necessary" to acknowledge and guard the treaty rights of the United States. It was further stated that even if there were errors in judgement on the part of the Mixed Court, the Egyptian Government could not be held responsible for such errors, because that Government was not in a position to prevent the repetition of such faults, nor could they remove the judges or punish them by disciplinary action, without the consent of the capitulatory Powers.<sup>648</sup>

THE "I'M ALONE" CASE (*Canada/United States of America*) (1933)

468. The Convention of 23 January 1924 between Canada and the United States of America regarding the smuggling of intoxicating liquors conferred rights of search and seizure, to be exercised at a distance not greater from the United States coast than could

be traversed in one hour by the suspected vessel. On 22 March 1929, the *I'm Alone*, a rum-runner of Canadian registry, was sunk on the high seas in the Gulf of Mexico by the United States revenue cutter *Dexter*. According to the American allegation, on 20 March 1929, the *I'm Alone* was sighted by the United States coast guard vessel *Wolcott* within approximately 10.5 nautical miles of the coast, i.e., within the distance which could be traversed in one hour by the vessel. Despite repeated orders by the *Wolcott* to stop for boarding and examination, the *I'm Alone* proceeded seaward. The pursuit was continued subsequently by another coast guard vessel, the *Dexter*. Several warning shots by the *Dexter* were ignored. The master of the *I'm Alone* drew a revolver and declared that the vessel would be sunk rather than stop. Since the sea was too rough to permit the vessel to be boarded and seized by force, it was finally sunk by the *Dexter*.

469. The case was referred to a Commission under the Convention of 23 January 1924 between the United Kingdom and the United States. In a joint interim report of 30 January 1933, the arbitration commissioners stated that one of the questions was whether the United States was legally justified in sinking the *I'm Alone*, assuming that it had a right of hot pursuit in the circumstances and was entitled to exercise the rights under the Convention of 1924. Stressing the intentional nature of the sinking, the commissioners answered that question as follows:

On the assumptions stated in the question, the United States might, consistently with the Convention, use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel, and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless. But the Commissioners think that, in the circumstances stated in ... the Answer, the admittedly intentional sinking of the suspected vessel was not justified by anything in the Convention.<sup>649</sup>

In a joint final report of 5 January 1935, the commissioners added that the sinking of the vessel was not justified either by any principle of international law.<sup>650</sup>

THE BROWNE CASE (*Panama/United States of America*) (1933)

470. The Government of Panama purchased in 1929 a right of way through a coffee plantation belonging to J. W. Browne and G. A. Browne, American citizens, and improved a road already existing along that way. In October 1930, part of the road was washed out by heavy rains which caused damage to the Brownes' property. A claim brought by J. W. Browne was submitted to the Panamanian/United States General Claims Commission established under the Claims Convention of 28 July 1926. The United States contended, *inter alia*, that the wash-out

<sup>648</sup> *Ibid.*, vol. II (Sales No. 1949.V.1), pp. 1165-1203.

<sup>649</sup> *Ibid.*, vol. III (Sales No. 1949.V.2), p. 1615.

<sup>650</sup> *Ibid.*, p. 1617.



was caused by the negligent construction of the improved road. In its decision of 26 June 1933, the Commission found "no adequate evidence that the wash-out was the result of negligent construction", and added:

The terrain was of that rough and broken type where wash-outs are difficult to guard against, except by a kind of construction which cannot be expected in connexion with small country roads.<sup>651</sup>

#### THE PUGH CASE (*Panama/United Kingdom*) (1933)

471. James Pugh, a seaman from the Irish Free State employed on the steamship *Parismina*, was on 30 June 1929 drinking at a bar in Colón (Panama). After he refused to pay for some of the drinks, the barkeeper sent for the police. Pugh was soon arrested by two policemen, who proceeded to take him to the police station. On the way, Pugh tried forcefully to resist arrest and violent fighting ensued with the policemen, who were compelled to use their clubs in order to subdue him and to defend themselves. Pugh fell backward and lost consciousness. He was taken to a hospital, where he died shortly afterwards. Under the Agreement of 15 October 1932 between Panama and the United Kingdom the case was referred to arbitration. The arbitrator dismissed the claim of the United Kingdom, saying *inter alia* that (1) the death of Pugh did not occur as the result of any excessive use by the police officers of the powers reasonably vested in them as agents of the public order; (2) the actions of the police agents in the use of their clubs were neither malicious nor voluntary and were not, therefore, culpable; and (3) Pugh came to his death through his own fault while attempting to resist lawful arrest and while engaged in unlawfully attacking police officers in the lawful discharge of their duties.<sup>652</sup>

#### THE WALWAL INCIDENT (*Ethiopia/Italy*) (1935)

472. The region of Walwal, which until 1928 had been freely visited by nomad tribes under the British, Ethiopian and Italian administrations for the purpose of using water found in wells existing there, was occupied by the Italian colonial authorities in Somalia since 1930. The Ethiopian Government, however, considered the region as belonging to its own territory and did not recognize the region's occupation by the Italian authorities. On 2 November 1934, a group of about 600 Ethiopian soldiers arrived at Walwal for the declared purpose of protecting an Anglo-Ethiopian Commission engaged in the demarcation of the frontier between Ethiopia and Somaliland and in other surveying work. The Ethiopian troops took possession of some of the wells in spite of the protests of the Italian forces. Confrontation and tension began to develop between the two forces, the

numbers of which were later increased. On 5 December, following a gunshot from an undetermined source, a full-scale conflict erupted between them. About 130 Ethiopian soldiers and 30 Italian soldiers were killed as a result of the fighting. Each side charged that the other had fired the first shot.

473. The question of the responsibility arising out of the incident, and of other minor subsequent incidents, was referred to the Italo/Ethiopian Conciliation and Arbitration Commission established in accordance with the Treaty of Friendship Conciliation and Arbitration of 2 August 1928. In its decision of 3 September 1935, the Commission, stressing the accidental character of the first firing, concluded as follows:

The Commission is ... led to the conclusion that this incident was due to an unfortunate chain of circumstances: the first shot might have been as accidental in character as those, so many and so frequent, that preceded it; it is wholly understandable that in the state of nervousness, excitement and suspicion that prevailed among the rival troops, stationed for two weeks in dangerous proximity, this shot should have determined the regrettable results that followed.

In the circumstances, the Commission ... finds as follows:

1. That no responsibility can be imputed on the specific head of the Walwal incident to the Italian Government or to its agents on the spot; the allegations made against them by the Ethiopian Government are contradicted among other things by the many precautions taken by them to prevent any incident arising during the arrival at Walwal of the regular and irregular Ethiopian troops and also by the absence on their part of any interest in provoking the engagement of 5 December; and

2. That, although the Ethiopian Government likewise had no reasonable interest in provoking the engagement, its local authorities might, by their attitude, particularly by the concentration and maintenance, after the departure of the Anglo-Ethiopian Commission, of a large number of troops near the Italian line at Walwal, have given the impression that they had an aggressive intent, which would appear to lend plausibility to the Italian version, but that nevertheless it is not shown that they could be held responsible on the specific head of the incident of 5 December.<sup>653</sup>

474. As to the subsequent minor incidents, the Commission held likewise that:

... these first incidents, following on that at Walwal, were accidental in character, while the others were for the most part not serious and not at all uncommon in the region in which they took place.

In the circumstances, the Commission is of the opinion that there are no grounds for finding any international responsibility for these minor incidents.<sup>654</sup>

#### THE TRAIL SMELTER CASE (*Canada/United States of America*) (1938 and 1941)

475. The Columbia River has its source in Canada, and near Trail in British Columbia it flows past a smelter where lead and zinc were smelted in large quantities. The smelter was started under American auspices in 1896, but had been taken over by a Canadian company in 1906. In 1925 and 1927, two

<sup>651</sup> *Ibid.*, vol. VI (Sales No. 1955.V.3), p. 334.

<sup>652</sup> *Ibid.*, vol. III (*op. cit.*), pp. 1441-1453.

<sup>653</sup> *Ibid.*, p. 1666.

<sup>654</sup> *Ibid.*, p. 1667.

stacks, 409 feet in height, were erected and the smelter increased its output. This increased production resulted in more sulphur dioxide fumes and higher concentrations being emitted into the air. It was contended by the United States that the added height of the stacks increased the area of damage in United States territory. From 1925 to at least 1931, damage was caused in the State of Washington by the sulphur dioxide emitted from the Trail smelter. The International Joint Commission established under the Anglo-American Convention of 1909 recommended that the sum of \$350,000 should be paid to cover the damage occurring up to 1 January 1932, but the United States informed the Canadian Government that conditions were still unsatisfactory, and an Arbitration Convention was signed on 15 April 1935.

476. In an interim award of 16 April 1938, the arbitral tribunal stated, *inter alia*:

... With respect to ... "damages in respect of cleared land and improvements thereon", and "damages in respect of uncleared land and improvements thereon", the tribunal has reached the conclusion that damage due to fumigation has been proved to have occurred since 1 January 1932 ...

Since the tribunal has concluded ... that the existence of injury has been proved, it becomes necessary to consider next the cause of injury ...

In general, it may be said that the witnesses expressed contrary views and arrived at opposite conclusions on most of the questions relating to cause of injury. [However,] the tribunal is of opinion that the witnesses were completely honest and sincere in their views and that the expert witnesses arrived at their conclusions as the integral result of their high technical skill ...

... The witnesses for both Governments appeared to be definitely of the opinion that the gas was carried from the smelter by means of surface winds, and they based their views on [the] theory of the mechanism of gas distribution. The tribunal finds itself unable to accept this theory ...

The tribunal is of opinion that the gases emerging from the stacks of the Trail smelter find their way into the upper air currents and are carried by these currents in a fairly continuous stream down the valley so long as the prevailing wind at that level is in that direction. ... The tribunal is of opinion that the fumigation which occurs at various points along the valley is caused by the mixing with the surface atmosphere of this upper air stream ...

With regard to cleared land used for crops, the tribunal has found that damage through reduction in crop yield due to fumigation has occurred in varying degrees during each of the years 1932 to 1936 and it has found no proof of damage in the year 1937 ...<sup>655</sup>

In its conclusions, the tribunal awarded damages for injury caused between 1932 and 1937, but declined to award any damages for what the United States described as "violation of sovereignty", and decided that it could not, with its existing information, determine a permanent régime.

477. In its final award of 11 March 1941, the tribunal held that no further damage had ensued, and a permanent régime was determined. The award stated, *inter alia*:

As Professor Eagleton puts it (in *Responsibility of States in International Law*, 1928, p. 80): "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction" ... International decisions, in various mat-

ters, from the *Alabama* case onwards, and also earlier ones, are based on the same general principle, and, indeed, this principle, as such, has not been questioned by Canada. But the real difficulty often arises rather when it comes to determine what, *pro subjecta materie*, is deemed to constitute an injurious act ...

No case of air pollution dealt with by an international tribunal has been brought to the attention of the tribunal, nor does the tribunal know of any such case. The nearest analogy is that of water pollution. But, here also, no decision of an international tribunal has been cited or has been found.

There are, however, as regards both air pollution and water pollution, certain decisions of the Supreme Court of the United States which may legitimately be taken as a guide in this field of international law, for it is reasonable to follow by analogy, in international cases, precedents established by that Court in dealing with controversies between States of the Union or with other controversies concerning the quasi-sovereign rights of such States, where no contrary rule prevails in international law and no reason for rejecting such precedents can be adduced from the limitations of sovereignty inherent in the Constitution of the United States ...

In ... *State of New York v. State of New Jersey* (256 U.S. 296, 309) ... the Court said: "the burden upon the State of New York of sustaining the allegations of its bill is much greater than that imposed upon a complainant in an ordinary suit between private parties. Before this Court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence".

What the Supreme Court says there of its power under the Constitution equally applies to the extraordinary power granted [to] this tribunal under the Convention. What is true between States of the Union is at least equally true concerning the relations between the United States and the Dominion of Canada ...

The tribunal, therefore finds that the above decisions, taken as a whole, constitute an adequate basis for its conclusions, namely that, under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

The decisions of the Supreme Court of the United States which are the basis of these conclusions are decisions in equity and a solution inspired by them, together with the régime hereinafter prescribed, will, in the opinion of the tribunal, be "just to all parties concerned", as long, at least, as the present conditions in the Columbia River Valley continue to prevail.

Considering the circumstances of the case, the tribunal holds that the Dominion of Canada is responsible in international law for the conduct of the Trail smelter. Apart from the undertaking of the Convention, it is, therefore, the duty of the Government of the Dominion of Canada to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined.

The tribunal, therefore, answers question No. 2 as follows: so long as the present conditions in the Columbia River Valley prevail, the Trail smelter shall be required to refrain from causing any damage through fumes in the State of Washington, the damage herein referred to and its extent being such as would be recoverable under the decisions of the courts of the United States in suits between private individuals. The indemnity for such damage should be fixed in such manner as the Governments... should agree upon.

... Answering [the third] question in the light of the preceding one, since the tribunal has ... found that damage caused by the Trail smelter has occurred in the State of Washington since 1 January, 1932, and since the tribunal is of opinion that damage may occur in the future unless the operations of the smelter shall

<sup>655</sup> *Ibid.*, pp. 1920 and 1922-1924.

be subject to some control, in order to avoid damage occurring, the tribunal now decides that a régime or measure of control shall be applied to the operations of the smelter and shall remain in full force unless and until modified in accordance with the provisions hereinafter set forth ...

... The tribunal is of opinion that the prescribed régime will probably remove the causes of the present controversy and ... will probably result in preventing any damage of a material nature occurring in the State of Washington in the future.

...<sup>656</sup>

#### THE DE WYTENHOVE CASE (*France/Italy*) (1950)

478. Mrs. and Miss Alice de Wytenhove, French residents in Milan from 1907 until 1939, decided to leave the city for fear of political developments, but before doing so they entrusted a certain number of furs which they owned to an Italian merchant, Mrs. Enrica Corridori. In view of the frequent bombardment of Milan during the Second World War, Mrs. Corridori decided in August 1943 to transfer the furs to Caronno but they were lost on the way. After the end of the war, Mrs. de Wytenhove brought a claim for compensation under article 78, paragraph 4, of the Treaty of Peace with Italy of 1947, which provided for the payment of indemnity by the Italian Government for the property of United Nations nationals in Italy lost as a result of "the acts of war". The case was taken up by the French/Italian Conciliation Commission constituted under article 83 of the Peace Treaty. In its decision of 11 November 1950, the Commission, after admitting that the furs in question were lost while they were being transferred "for the purpose of protecting the furs ... from the results of any bombing", held, however, that the loss constituted "a fortuitous event" and that it was not possible to consider the damage as resulting from "the acts of war" in the sense of article 78 of the Peace Treaty.<sup>657</sup>

#### THE CURRIE CASE (*Italy/United Kingdom*) (1954)

479. Percy Currie and his wife, both British subjects, owned certain buildings in Milan. After Italy declared war on the United Kingdom, their assets were sequestered in 1940 and 1941. The buildings so sequestered sustained considerable damage as a result of an air-raid in August 1943. Subsequently, the condition of the buildings worsened, owing to exposure to the weather. After the Second World War, the Curries brought a claim for the damage sustained before the Anglo-Italian Conciliation Commission constituted under article 83 of the Peace Treaty with Italy. The Italian Government argued that it was responsible only within the limits of paragraphs 4 (a) and 4 (d) of article 78 of the Peace Treaty. So far as damages resulting from discriminatory measures taken against enemy subjects were concerned, the

Italian Government considered that its responsibility would arise only if it was proved that the sequestrator caused damage deliberately or by negligence and denied such responsibility in the case, contending:

... one cannot blame the sequestrator for the fact that during the war the damage caused by bombing was not immediately repaired; in reality, the omission complained of was due to the fact that the sequestrator was unable to make such arrangements, taking into due account the state of war, the shortage of raw materials and manpower, and the general difficulties prevailing at the time.<sup>658</sup>

480. In its decision of 13 March 1954, the Commission rejected the Italian argument, saying that the paragraphs of the Peace Treaty in question rendered Italy responsible for the damage, irrespective of whether or not the sequestrator was unable to make the necessary repairs in good time.

#### THE CASE OF ITALIAN PROPERTY IN TUNISIA (*France/Italy*) (1955)

481. In its decision of 25 June 1955 concerning Italian property in Tunisia, the French/Italian Conciliation Commission, constituted under article 83 of the Peace Treaty with Italy, elaborated on the relationship between the international responsibility of States and the "fault" element, as follows:

... a causal nexus between that measure (the sequestration) and the damage or loss is not, therefore, sufficient for responsibility to be ascribed to the French Government in the person of its organs. The latter could have committed a fault (negligence or imprudence) in the appointment of the sequestrator (*culpa in eligendo*), in supervising the management of the sequestration (*culpa in custodiendo*), in giving the necessary instructions (*culpa in instruendo*) or in granting the authorizations required by domestic legislation (cf. art. 7 of the Residential Decree of 8 March 1943); the sequestrator in turn, himself also an organ of the French Government, could have committed a fault *in committendo* or *in omittendo*.

In theory, the basis for the international responsibility of States is controversial; traditional teaching, which goes back to Grotius, requires fault [to be established], whereas Anzilotti and other modern writers are satisfied with risk, and refer to an objective responsibility based on the causal nexus between the activity established and the act contrary to international law (cf. Rousseau, *Droit international public*, pp. 359 and 360; Verdross, *Völkerrecht*, 2nd ed., p. 285; Guggenheim, *Traité de droit international public*, II, p. 49 *et seq.*; Morelli, *Nozioni di diritto internazionale*, p. 348 *et seq.*). The second opinion is altogether unacceptable; for example, with regard to the acts constituting the omission of preventive or repressive measures in respect of activities of individuals injurious to specified foreign interests; in these hypothetical cases, the State is responsible, in that its organs have not exercised a certain degree of diligence (Morelli, *op. cit.*, p. 50; Rousseau, *op. cit.*, p. 360). Precisely, in the present case, the act contrary to international law is not the sequestration but an alleged absence of diligence on the part of the French State, or, more precisely, of the individual acting on its behalf in executing that measure, which the Italian Government has actually recognized for the period in question.

On the other hand, it is not necessary for the fault imputable to the French Government or to its organs, officials or agents, particularly the sequestrator, to be a serious one ...<sup>659</sup>

<sup>656</sup> *Ibid.*, p. 1963-1966 and 1980.

<sup>657</sup> *Ibid.*, vol. XIII (Sales No. 64.V.3), p. 228.

<sup>658</sup> *Ibid.*, vol. XIV (Sales No. 65.V.4), p. 24.

<sup>659</sup> *Ibid.*, vol. XIII (*op. cit.*), p. 432. The principle of fault enunciated in this case was repeated and heavily relied upon by the

THE ETABLISSEMENTS AGACHE CASE  
(France/Italy) (1955)

482. In October 1939, a French company, Les Etablissements Agache, bought a certain quantity of hemp from an Italian firm, Associazione Prodotti Canapa, of Naples. During the transportation of the hemp to France, war was declared, and the merchandise was left at the station at Modena for nearly a year, later being re-transported to the Associazione's factory in Naples. Subsequently, the merchandise was requisitioned by the Allied Command. The sum received from the Allied Command, which was considerably lower than the original payment made by the French company, was placed in the Bank of Napoli at the disposal of Etablissements Agache on 10 September 1949. The French company brought a claim for compensation against the Italian Government under article 78, paragraph 4 (a) and (d) of the Peace Treaty with Italy. The case was settled by the French/Italian Conciliation Commission established under that Treaty. In its decision of 15 September 1955, the Commission rejected the claim, making a distinction between the damage caused by "acts or measures of war" and the "war itself". The Commission reasoned as follows:

The fact that the two goods waggons were unable to continue their journey beyond Modena (station of destination) was in no way the result of the Italian Government's taking any discriminatory measure concerning them, or with regard to any of the French solely due to the fact that, war having broken out between Italy and France, rail traffic was interrupted at the frontier between the two countries.

The declaration of war itself, by Italy against France, does not enter into account as a discriminatory measure in the sense of paragraph (d); it does not constitute a measure against the goods or a measure taken "during the war". Rather, the war itself, as an event, caused the halting of the two wagons at Modena ...

...  
This loss is certainly a consequence of the war, but not of an act of war, in the sense of the interpretation given by this Commission to article 78, paragraph 4 (a) of the Peace Treaty in its decision of 8 March 1951 ...

...  
The hemp belonging to Les Etablissements Agache was requisitioned by the Allied Command and the fact that it was spoiled and reduced in value is a result of the general disruption caused by the war in rail transport between Italy and France, which proved particularly injurious to merchandise arriving at the frontier station of Modena immediately after Italy's declaration of war on France.<sup>660</sup>

THE OTTOMAN EMPIRE LIGHTHOUSES CONCESSION CASE  
(France/Greece) (1956)

483. On 1 (14) April 1913, a contract was concluded between the French company Collas and Michel (which was known as the "Administration générale des phares de l'Empire ottoman") and the Ottoman Government extending the concession granted to

that company from 4 September 1924 to 4 September 1949. A dispute arose regarding the validity of the 1913 contract, with respect to the lighthouses situated in the territories which had been assigned to Greece after the Balkan wars. The case was first brought to the Permanent Court of International Justice, which decided on 17 March 1934<sup>661</sup> and 8 October 1937<sup>662</sup> that the 1913 contract was duly concluded and valid in respect of the lighthouses situated on the above-mentioned territories, as well as those situated on the territories of Crete, including the adjacent islets, and Samos, which were assigned to Greece after the Balkan wars. After the decisions of the Permanent Court, the French company and the Greek Government began negotiations for the settlement of mutual claims. However, they were unable to come to an agreement, and the French and the Greek Governments took the case to the Permanent Court of Arbitration, pursuant to the Special Agreement of 15 July 1931. The Court rendered its award, after the Second World War, on 24/27 July 1956.

484. Among the claims dealt with by the Court, *Claim No. 15* involved the lighthouse on the island of Paspargos, which the Greek authorities on 2 April 1915 had required Collas and Michel to hand over to them. On 5 October 1916, the lighthouse was destroyed by a bombardment from the Turkish batteries on the coast of Asia Minor. The Greek Government had a new lighthouse constructed at its own expense, but it appeared that its value was considerably less than the value of the original one when the lighthouse was returned to Collas and Michel as a consequence of the reversion of the island to the Turkish authorities in 1928, in accordance with the Peace Treaty of Lausanne of 1923. The company thus brought claims against the Greek Government for the loss of value and the expenses of restoration, etc. The Permanent Court of Arbitration stated in its decision:

As regards the depreciation of the equipment and supplies, Greece undoubtedly committed an irregularity by seizing these in 1915; but, for damage to generate responsibility, it is not enough for it to be consecutive to a fault. There must also be a causal relationship between the act and the damage; however, the prejudice caused by the impossibility for Greece of returning the lighthouse to the company in its original state was caused not by Greece's seizure but by the bombardment, which damaged it severely; that bombardment constituted a case of *force majeure* that would have affected it even if it had remained in the hands of the company and for which Greece could not be held responsible. No obligation, therefore, is incumbent upon Greece on this point, and the fact that it handed back to the company equipment and supplies of less value than those it received does not entail any responsibility on its part to pay compensation.<sup>663</sup>

485. *Claims No. 19 (and 21 in part)* concerned the evacuation ordered by the Greek authorities of the Administration générale des phares from offices in

same Tribunal in the 1959 case concerning Italian Property in Tunisia (*ibid.*, pp. 475-485).

<sup>660</sup> *Ibid.*, pp. 703-704.

<sup>661</sup> *P.C.I.J.*, Series A/B, No. 62, p. 4.

<sup>662</sup> *Ibid.*, No. 71, p. 94.

<sup>663</sup> United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), pp. 219-220.

the port of Salonika in 1915 on account of the alleged involvement of one of the company's staff in espionage. The Administration was forced to occupy other premises and was not able to return to its offices until April 1917. However, before various kinds of stores which had been warehoused in the temporary premises were transferred back to the former offices, a fire occurred on 18 August 1917, destroying the stores completely. The question was whether Greece was responsible for the losses caused to Collas and Michel either by the necessity for transferring their stores elsewhere (*Claim No. 21*) or by the fire (*Claim No. 19*).<sup>664</sup> The Court rejected the latter claim, arguing that no causal relationship could be found between the damage caused by fire, which was in no way caused by the Greek authorities, and the evacuation. It added that "the damage was neither a foreseeable nor a normal consequence of the evacuation, nor was it attributable to a lack of care on the part of Greece".<sup>665</sup>

486. *Counter-claim No. 10* brought by Greece involved the question of interpretation of article XII of the concession agreement of 1860 between the Ottoman Government and Collas and Michel, which read:

Although the cost of maintaining the equipment is to be borne in full by the concessionaires, they shall not be responsible for damage resulting from earthquakes, etc., that is to say, in cases of *force majeure*. When such cases occur, repairs shall be paid for by

<sup>664</sup> *Ibid.*, pp. 217-218.

<sup>665</sup> *Ibid.*, p. 218.

a levy upon gross receipts up to their full amount and before any of these receipts are distributed between the Government and the concessionaires.<sup>666</sup>

Greece argued that the above provision would render the company responsible for sharing the cost of the repairing and reconstruction carried out by the Greek authorities on four lighthouses which had been destroyed by Turkish or German military forces in 1916. France, on its part, attempted to exclude from the notion of *force majeure* in the article in question the events of war, which were human acts. The Court rejected the French interpretation of *force majeure*, for the following reasons:

It is true that acts of war are human actions, but that is not in itself sufficient to exclude them from the cases of *force majeure* envisaged in article XII with a view to regulating the relations between the State granting the concession and the concessionaire company. As far as these relations are concerned, damage caused by acts of war emanating from another State, the enemy of the State granting the concession indubitably constitutes damage caused by *force majeure*, calling for repair at joint expense. If, in 1916, Turkey had caused war damage to a lighthouse situated within a territory of the New Greece of 1913/1914, that damage could undoubtedly fall, as far as relations between Greece, the State granting the concession by subrogation, and the company were concerned, within those caused by *force majeure* and would have had to be borne equally by the two partners in the concession contract.<sup>667</sup>

<sup>666</sup> *Ibid.*, p. 241.

<sup>667</sup> *Ibid.*, p. 242. The Court, however, did not think article XII was applicable to the claim in question, since for Greece the original concession agreement was *res inter alios acta* (*ibid.*, p. 244).

## CHAPTER III

### Doctrine

487. The doctrinal views and statements dealt with in this chapter have been grouped in two sections. Section 1 contains a selection of doctrinal opinions which may be found in treatises, monographic works, articles in scientific reviews, etc., written by authors on international law. Section 2 refers to relevant provisions included in various codification drafts on State responsibility prepared by learned societies and by private individuals.

#### SECTION 1: WRITINGS OF SPECIALISTS

488. The selected doctrinal opinions of international law specialists reproduced in the present section have been presented under the following headings: (a) Introductory considerations to the problem: the "fault theory" and the "objective theory"; (b) Theoretical justifications of "*force majeure*" and "fortuitous event" as legal exceptions; (c) Conditions required for the existence of a legal exception of *force majeure* or of fortuitous event; (d) Material causes of an exception of *force majeure* or of

fortuitous event; (e) Legal effects of an exception of "*force majeure*" or of "fortuitous event".

#### (a) Introductory considerations to the problem: the "fault theory" and the "objective theory"

489. "*Force majeure*" and "fortuitous event" are legal notions which evoke immediately the absence

of any "fault" on the part of whoever has acted in the manner concerned.<sup>668</sup> Although the concept of fault and the concept of the violation of a legal obligation are not necessarily synonymous,<sup>669</sup> *force majeure* and fortuitous event also evoke the absence of a violation of a legal duty susceptible of entailing responsibility.<sup>670</sup> The doctrinal standpoint taken by international law writers on whether State responsibility for international wrongs is based on the concept of fault or arises "objectively" from a violation of an international obligation attributable to the State, as well as on the position of the element of fault in the "internationally wrongful act" and on the meaning to be attached to the very term "fault", could not, therefore, but be reflected in the views of those writers when they try to find a theoretical justification for the fact, ascertained from State practice and international judicial decisions, that, under certain conditions, *force majeure* and fortuitous event do preclude wrongfulness in international law.<sup>671</sup>

490. Consequently, before referring to the specific question of the theoretical explanations given by international law writers to justify the preclusion of wrongfulness by "*force majeure*" and "fortuitous event", it is necessary to begin with at least some broad considerations of the problem of "fault" in connexion with international responsibility, a prob-

lem that is generally known to be one of the most complex in the whole general theory of international law. In a recent article, published in 1968, Luzzatto recalls the complexity of the problem in the following terms:

One of the most celebrated and controversial questions in the matter of State responsibility in international law is the position of the element of fault, in the broadest sense of the word, in the internationally wrongful act. The points at issue, as we know, are whether the rules on responsibility in the international legal order constitute a system of objective responsibility or whether fault is a constituent element of the wrongful act; whether a distinction is to be made between wrongful omission and wrongful commission or, possibly, between State responsibility for acts of organs and State responsibility for acts of private individuals; and, lastly, whether fault might not play a significant part—quite apart from the notion of wrongfulness, which would be a separate issue—in giving rise to the obligation *ex delicto*, or to only some of the consequences of the wrongful act. Equally controversial are not only the solution to the problem but the approach to it, and the actual importance and the real practical scope of the problem itself; and so much study has been given to this question, by such authoritative writers, that it might seem pointless to spend more time discussing it; this might indeed be the case if one were to undertake a further study of the problem using the customary approach. Besides, all doctrines obviously come up against difficulties which prevent them from providing a clear and convincing explanation of international practice. Consequently, so as not to be forced to conclude that there is no legal criterion on the subject which might serve as a guideline in international relations, and that each individual situation is governed by its own particular criteria, we must attempt a new investigation of the issue, proceeding from a re-examination and clarification of the actual premises of the argument and arriving at as exhaustive an explanation as possible of the realities of the international situation.

To do this, it would appear necessary, at least for the time being, to forgo any attempt to find an answer to the question which might serve in a purely general way to explain the system of responsibility positively resulting from the international legal order in all possible cases. If we examine the various views held on this subject, one thing becomes quite clear: neither the criterion of fault nor the contrary principle of pure causality (taken as a basis for a system of liability for risk or some other system) can account for all the manifestations of opinion by States on this subject. And practice is singularly difficult to pin-point, because of the almost total absence of any allusion to either solution in the relevant texts, be they case-law decisions, statements by State organs, international agreements or other texts. This, in turn, is most probably a result of the divergent views held by scholars on this point. And it should come as no surprise; legal practice in fact uses its own momentum to solve individual cases, without pausing to dwell on problems of systematic construction, which belong to the realm of theory. However, in few cases like the present one is the relevant material so lacking in starting-points for a systematic construction.

But since it certainly does not seem advisable, from the methodological standpoint, to rule out consideration of particular instances of practice merely because they are hard to fit into a predetermined pattern, there would appear to be some justification, as already mentioned, for proceeding with a certain amount of caution, having in mind, of course, the possibility that the role of fault may vary from case to case.<sup>672</sup>

491. Against the Germanic doctrine of reprisals based on collective responsibility for wrongs done to a State or its subjects by a foreign State or its sub-

<sup>668</sup> Certain writers recognize expressly that *vis major* is a "corollary" of the principle of fault. See, for example, B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953), p. 224.

<sup>669</sup> "The two notions of 'violation of law' and 'fault' are often confused by writers on international law. Nevertheless, they are two essentially different concepts" (A. Decencière-Ferrandière, *La responsabilité internationale des Etats à raison des dommages subis par des étrangers* (Paris, Rousseau, 1925) (thesis), p. 74).

<sup>670</sup> According to R. L. Perret, "... although legal responsibility, for a jurist from continental Europe brought up in the Roman tradition, automatically evokes the notion of 'fault', for an Anglo-Saxon it will inevitably evoke the idea of duty, and this idea has already, as we have noted, penetrated gradually into the practice of international law, as the international relations of England and the States that have inherited the Common Law tradition have increased and multiplied ..." (*De la faute et du devoir en droit international: Fondement de la responsabilité* (Zürcher Studien zum Internationalen Recht, No. 33) (Zurich, Polygraphischer Verlag, 1962), p. 207).

<sup>671</sup> Speaking in general terms on the question of the limits to international responsibility J. B. Scott, in a statement made at Washington in 1925 before the American Society of International Law, said:

"The Government of each country is responsible to the other [countries] for a lapse of duty. However, there must be a limit to responsibility. It is to be presumed that every Government desires to perform its duties, and not to allow the foreign State or its citizens to be prejudiced or injured. There are, however, occasions when the prejudice or injury arises so suddenly that it can not be foreseen or controlled in time to prevent damage. In such case, it would seem that the State should only be responsible for what could reasonably be foreseen, and that it should not be taxed with responsibility when it could not, in view of the circumstances, prevent the injury." ("The codification of international law in America", *Proceedings of the American Society of International Law at its nineteenth annual meeting* (Washington, D.C., April 23–25, 1925) (Washington, D.C., American Society of International Law, 1925), p. 34.)

<sup>672</sup> R. Luzzatto, "Responsabilità e colpa in diritto internazionale", *Rivista di diritto internazionale*, (Milan, vol. II, No. 1, 1968), pp. 53–57.

jects, Grotius introduced into international law the Roman law doctrine of responsibility as dependent on "fault" (*culpa*). Grotius started with the famous old principle of Roman law, *Ex tali culpa obligatio naturaliter oritur si damnum datum est* ("From such a subjective fault springs naturally an obligation, if damage has resulted"). This rule he applied both to acts of Governments through its agents and to acts of individuals. As to the former, he said:

The liability of one for acts of his servants without fault of his own does not belong to the law of nations, according to which this question has to be settled, but to municipal law; and that [is] not a universal rule, but one introduced as against sailors and some other persons for particular reasons.<sup>673</sup>

As for the acts of individuals, Grotius said: "A civil community, just as any other community, is not bound by the act of individuals, apart from some act or neglect of its own."<sup>674</sup> This "act or neglect of its own", the "fault" of the State, lies, in the case of acts of individuals, in *patientia* and *receptus*, namely in the sharing in the wrong by "allowing" or "receiving". There would be *patientia* when the State did not prevent the act of the individual that it was bound to prevent, and *receptus* when the State prevented the punishment of the individual concerned by refusing either his extradition or declined to punish him itself. The "fault" (*culpa*) upon which Grotius based international responsibility was conceived as a "subjective fault" of the State itself, and excluded responsibility for acts or omissions resulting from "fortuitous events"<sup>675</sup> Such a foundation of international responsibility was reaffirmed, subject to certain modifications and exceptions, by the followers of Grotius, Zouch, Pufendorf,<sup>676</sup> Wolff, Vattel, Burlamaqui, etc. Vattel, for example, wrote:

... it would be unjust to impute to the nation, or to the sovereign, all the faults of their citizens. Hence, it can not be asserted

<sup>673</sup> H. Grotius, *De Jure Belli ac Pacis, Libri Tres, Liber Secundus, Caput XVII, XX* (Trans. F. W. Kelsey) (Oxford, Clarendon Press, 1925), vol. II, p. 437.

<sup>674</sup> *Ibid.*, Caput XXI, II (*ibid.*, p. 523).

<sup>675</sup> Grotius considers "the rule of '*culpa pura*' as being in conformity with the natural order; this is why it is equally valid in international law" (M. G. Cohn, "La théorie de la responsabilité internationale", *Recueil des cours de l'Académie de droit international de La Haye, 1939-II* (Paris, Sirey, 1939), vol. 68, p. 242).

<sup>676</sup> "The writings of Pufendorf introduce an innovation in the classic theory of international responsibility. Pufendorf seemingly confined himself to reproducing the conclusions of Grotius, but he incidentally introduced a new element which was to exercise a notable influence on the development of the theory. With Pufendorf, the theory of international responsibility took on an 'objective' orientation, with 'presumptions' acquiring distinct relevance. Pufendorf founded his theory on the notion of asylum and complexity, on which Grotius based State responsibility for the acts of individuals. The State was responsible only if it knew about the illicit act and had the power and ability to prevent it. However, Pufendorf corrected or supplemented the principle, stating that 'it is presumed that the State knows about the act, and it is presumed also that it has the power to prevent the crime' (Pufendorf, *De Jure Naturae et Gentium Libri Octo*, lib. VIII, chap. VI, sect. 12). Presumption was the first step towards the so-called objectivization of international responsibility." (M. Aguilar Navarro, "La responsabilidad internacional y la organización de la sociedad internacional", *Escuela de Funcionarios Internacionales, Cursos y Conferencias 1, 1955-1956* (Madrid, 1957), vol. I, p. 153).

in general that one has been injured by a nation, because one has been injured by one of its citizens.

But if the nation, or its ruler, approve and ratify the act of the citizen, it takes upon itself the act, and may then be regarded by the injured party as the real author of the affront of which the citizen was perhaps only the instrument.

If the injured State has hold of the offender, it may without hesitation inflict just punishment upon him. If the offender has escaped and returned to his own country, justice should be demanded of his sovereign.

And since the sovereign should not permit his subjects to trouble or injure the subjects of another State, much less to be so bold as to offend a foreign Power, he should force the offender to repair the evil, if that can be done, or punish him as an example to others, or finally, according to the nature and circumstances of the case, deliver him up to the injured State, so that it may inflict due punishment upon him ...

A sovereign who refuses to repair the evil done by one of his subjects, or to punish the criminal, or, finally, to deliver him up, makes himself in a way an accessory to the deed, and becomes responsible for it ...<sup>677</sup>

492. In the nineteenth century, international law writers, following closely in the footsteps of Grotius, adopted the Roman principle of *culpa* as the basis of responsibility in international law. Thus, for example, Phillimore says, in a chapter devoted to self-preservation, that:

In all cases where the territory of one nation is invaded from the country of another—whether the invading force be composed of the refugees of the country invaded, or of subjects of the other country, or both—the Government of the invaded country has a right to be satisfied that the country from which the invasion has come has neither by sufferance nor reception (*patientia aut receptu*) knowingly aided or abetted it.<sup>678</sup>

Actually, it was only at the end of that century that the opposing theories arose firstly with Triepel and later on, at the beginning of the twentieth century, with Anzilotti. Starting from the assumption that the legal precepts of the international community are a result of the direct will of the State, which is not bound to a greater extent than it wishes, Anzilotti arrived in 1902 at the conclusion that the State is responsible not for a possible culpable or malicious intention, but for not having fulfilled the obligation imposed upon it by international law, for having violated a duty to other States. Anzilotti, for whom "fault", understood in the broad sense of *dolus* and *culpa*, "expresses attitudes of the will as a psychological fact", considered that it was not possible to speak about "fault", except when referring to the individual<sup>679</sup> For him, it is not fault (*dolus, culpa*),

<sup>677</sup> E. de Vattel, *The Law of Nations, or the Principles of Natural Law*, Book II, chap. VI (English translation of the edition of 1758 by C. G. Fenwick) (Washington, D.C., Carnegie Institution of Washington, 1916), vol. III, pp. 136-137.

<sup>678</sup> Sir Robert Phillimore, *Commentaries upon International Law*, 3rd ed. (London, Butterworths, 1879), pp. 316-317.

<sup>679</sup> D. Anzilotti, *Teoria generale della responsabilità dello Stato nel diritto internazionale* (Florence, Lumachi, 1902), p. 172 (reprinted in *Scritti di diritto internazionale pubblico* (Padua, CEDAM, 1956), vol. I, p. 121); see also Anzilotti, *Cours de droit international, op. cit.*, pp. 496 *et seq.*; and "La responsabilité internationale des États à raison des dommages soufferts par des étrangers", *Revue générale de droit international public* (Paris), vol. XIII, Nos. 1 and 3, 1906, pp. 13 *et seq.* (also reprinted in *Scritti di diritto internazionale pubblico (op. cit.)*, vol. I).



but a fact contrary to international law, which originates responsibility: "in international law, the *animus* of the individual-organ is not the cause or condition of responsibility; responsibility arises from the sole fact of the violation of an international duty of the State".<sup>680</sup>

493. After Anzilotti, the previous doctrinal consensus on the question of international responsibility disappears and writers follow, broadly speaking, two main tendencies. One group continues to consider that the element of fault is a requirement for the establishment of international responsibility, while the other group accepts the thesis that international responsibility is established "objectively" by the violation of an international obligation through an act or omission attributable to the State, without the need for proving the existence of any additional subjective element like fault (*culpa*). Between those two main trends, a group of writers, for example, Benjamin, Buxbaum, Schön, Strupp, Jess, De Visscher, etc., develops various intermediate theories. Moreover, fault is no longer presented, generally speaking, as referring to the State itself, as Grotius did, but to the organ or individual who acts on behalf of the State. The various different phases of the historical evolution of international legal doctrine on the problem of fault in connexion with international wrongs were summarized in 1940 by Ago—in an article in which he presents the modern theory of fault in a comprehensive manner,<sup>681</sup> as follows:

The traditional concept, which arose as a result of the historical trend towards re-emphasizing the Roman school of law at the expense of the German school, was initially touched on by Alberico Gentili and was gradually more clearly defined by Hugo Grotius ... Having defined *maleficium*, among the sources of liability, as any culpable violation of a legal obligation, the great Dutch jurist, after posing the problem of the responsibility of *reges ac magistratus* for the acts of their ministers, officials or subjects, denied that they could be held responsible unless they were themselves at fault, and affirmed that responsibility could only be imputed to them if they were guilty of not having taken the necessary preventive or repressive measures against the criminal acts involved. It is on the basis of this precept, therefore, that the traditional theory of international responsibility resulting from *patientia* or *receptus* was developed, and it was reiterated and reaffirmed by all the followers of Grotius, from Zouch to Pufendorf, Wolff, Cocceio, Burlamaqui, and particularly Vattel. According to this theory, the State, identified in some way with its supreme organs, cannot be held responsible for the wrongful acts of its officials or of individuals in general, unless it eventually becomes an accomplice to those acts or endorses them by approving or ratifying them or by refusing to punish the guilty party.

This point of view remained substantially unchanged and became the nineteenth century theory and, as such, spread throughout Italy, Germany, France, the Latin American countries, and particularly the Anglo-Saxon countries. Some writers, such as Calvo, Bonfils and others, deal with international responsibility only in connexion with the acts of private individuals; others, par-

ticularly Phillimore and Hall, citing a passage from Pufendorf, introduce the concept of aggravating circumstances for the State held responsible, such as the presumption—valid only until there is proof to the contrary—that complicity deriving from *patientia* on the part of the State is to be found in all injurious acts of foreign States committed by their own subjects, so that the State must be held responsible *prima facie* in every case. But the main lines of the theory still remain the same, in that international responsibility is still spoken of only as a responsibility of the Government for the acts of its subordinates, officials or, above all, private individuals; and that the principle whereby the State, with or without presumptions unfavourable to it, remains responsible only in cases where it may itself be at fault is uniformly upheld.

2. The first substantial deviation from the traditional concept is to be found in the doctrine of Triepel. This author deals with the problem of fault exclusively in connexion with the responsibility of the State as a consequence of the acts of private individuals. In that context, he makes a distinction between two different kinds of international responsibility which have different origins, although they are caused by the same act: on the one hand, the obligation to make reparation, an obligation which, in accordance in a certain sense with the Grotius doctrine, arises only when it is ascertained that, in addition to an injurious act on the part of an individual, there also exists *patientia*, and thus fault on the part of the State, of which the injurious act is more properly the result; and, on the other hand, the obligation to grant satisfaction to the injured foreign nation, an obligation which arises instead from the individual act, irrespective of any fault on the part of the State. According to Triepel, it is in the violation of the second obligation that can be found the element of *receptus*, which has been erroneously assimilated to the *patientia* of the traditional theory, whereas it in fact constitutes non-fulfilment of a duty which is not a primary but a secondary duty deriving precisely from confirmation of the individual act. While the obligation to make reparation is thus the form of responsibility deriving from fault on the part of the State, the obligation to grant satisfaction by punishing the individual who committed the injurious act is the typical form of State responsibility for the acts of private persons, a responsibility which thus has a purely objective character.

The fact that Triepel's doctrine has had so few followers can be easily explained by its substantial inconsistency. Although, indeed, it is to that author's credit that he first found that the State was responsible only for its own conduct, it is hard to see how he could then go on to suggest that the obligation to punish the private individual at fault is a consequence of the responsibility directly incurred by the State for the act of an individual, and not a primary international obligation, the violation of which alone gives rise to responsibility. The very arguments which Triepel adduces in support of his point of view are, moreover, very inadequate and fully deserve the criticism levelled against them.

3. The position taken by Anzilotti from the very beginning of this century—a position which is clearly antithetical to the traditional position—is much better reasoned, more soundly based and infinitely more crucial to the gradual development of the theoretical movement. It is the view of that great author that imputability, defined as the relationship between an act which is objectively at variance with the law and the activity of the State, should be considered simply as a cause and effect relationship, independent of any subjective basis, criminal intent or fault on the part of the agent. In this sense, international responsibility should be understood, in any hypothesis, to be purely objective. Precisely because of the influence which it has had on the development of the doctrine, the basic outline of this point of view must be taken into account and can be briefly summarized as follows: criminal intent and fault, in the proper meaning of the word, describe attitudes of will as a psychological act and it is therefore impossible to speak of them without referring to the individual. The problem consists therefore in seeing whether or not conduct which is at variance with international law must be the result of criminal in-

<sup>680</sup> Anzilotti, *Cours de droit international* (op. cit.), p. 501.

<sup>681</sup> The writer reaches the conclusion that: "... in general international law, fault *lato sensu* constitutes an essential subjective condition for the imputation of an internationally wrongful act" (R. Ago, "La colpa nell'illecito internazionale", *Scritti giuridici in onore di Santi Romano* (Padua, CEDAM, 1940), vol. 3, p. 206).

tent or fault on the part of individual-organs in order to be attributable to the State. As for the will and action of the organs, in so far as they can be considered the will and action of the State, to the extent that the law of the latter allows, it is the domestic law of the State that establishes the cases in which the conduct of individual-organs can be attributed to the State. Consequently, in cases where the actions of organs give rise, under positive international law, to the international responsibility of the State, two different hypotheses can be noted: either that the act of the organ is at variance with both international and domestic law, or that it is at variance with international law but in accordance with the law of the State. In the first case, the fault of the individual-organ which has acted contrary to the laws of its State would, according to Anzilotti, logically exclude the possibility that the act of the individual could be considered as an act of the State. If, however, in this same case, a rule of customary international law affirms that the State is equally responsible, it would mean that international responsibility is based not on a fault of the agent, but on a true and proper guarantee which the State provides to cover all injuries caused by the actions of its organizations. In the second case, in which the individual-organ acts in violation of international law but in conformity with its domestic jurisdiction, its action should certainly be considered imputable to the State; but, still according to Anzilotti, it is not possible to speak of the fault of an individual-organ which has acted in compliance with the laws of its State. Since in this case, too, the State is without any doubt internationally responsible, the conclusion is that the imputability in this case is entirely separate from the fault, and the international responsibility is purely objective.

Anzilotti also applies his conclusion logically to the cases of so-called responsibility for the acts of private individuals; such responsibility, as he rightly observes, is always and exclusively a responsibility for the acts of organs, in so far as it does not derive either from the act of a private individual or from a kind of criminal or culpable participation by the State in such an act, but rather from the violation of an international duty directly incumbent on the State: the duty not to tolerate the act of the private individual or to punish him if the act occurs. Anzilotti notes that this obligation does not consist in an inadmissible duty to prohibit absolutely an injurious act on the part of one of its own subjects, but merely in the adoption of a specific policy for the prevention and repression of such acts. Thus, if the act occurs despite the adoption of such a policy or despite the fact that the necessary preventive or punitive measures have been taken, international responsibility does not arise, not because of any lack of fault on the part of the State, but simply because there has been no violation of the international obligation, which has been fully observed. In this field, too, therefore, in which it was more traditionally established, the doctrine of fault as the basis for international responsibility is no more than the result of a simple and convenient analogy and, from the strictest point of view, should be totally eliminated.

4. Following the appearance of the theory outlined above, the unity of the doctrine concerning the problem of fault was finally shattered. It is true that some fundamental concepts are still accepted, such as the idea that the State is always responsible only for its own acts, and that only the acts and fault of its organs can be considered to be the acts and fault of the State; but the question whether, and in which cases, fault on the part of its organs is a necessary prerequisite for international responsibility on the part of the State is extremely controversial.

Some writers, although not very many, certainly endorse Anzilotti's conclusions, for instance, in Italy, Romano and Cavaglieri. The latter states, moreover, that he agrees with Anzilotti only *de lege ferenda*, whereas *de lege lata* he recognizes that practice is uncertain on this point and that it is a problem of interpretation which must be solved on a case-by-case basis. Scerni and Monaco also state that it is a question of the exact interpretation of the

legal rule which is alleged to have been violated. In foreign writings, the absolutely negative trend with regard to the question of fault is followed by Décencière-Ferrandière, who simply reproduce the considerations given by Anzilotti, Bourquin, Lapradelle and Politis in their commentary on the case of the *Alabama*, by Basdevant and even Kelsen. According to Kelsen, the psychological relationship existing between the organ which perpetrated the wrongdoing and the wrongdoing itself should be totally disregarded, both with regard to what he calls the central imputation (*zentrale Zurechnung*) to the State of the act committed by the organ, an imputation which is within the competence of the State, and with regard to what he calls the peripheral imputation (*periphere Zurechnung*) to the State of the sanction, an imputation which is instead within the competence of international law. It can also be said that this trend is strongly supported both by Eagleton and by Borchard, who considers it appropriate to exclude a concept such as that of fault, which is apt to cause greater confusion on the subject, since its interpretation gives rise to much disagreement.

Instead, most authors continue to favour the traditional idea of fault as the necessary basis for international responsibility. But it must be noted that none of them has even attempted a satisfactory theoretical refutation of the objections raised against the view accepted by them. Most of them, such as Oppenheim, von Liszt, Fauchille, and Hershey, confine themselves to mere statements unsupported by any arguments; others, such as Heilborn, Hatschek and Lauterpacht, still cling—some of them adamantly, despite the accusation that they are resorting to utterly inconsistent fictions—to the old idea of a State responsibility for *culpa in eligendo*, or of fault on the part of the supreme legislative or constitutional organs responsible for having ordered or permitted, by means of the rules laid down by them, the internationally wrongful acts committed by the organs subordinate to them. Lauterpacht seems to sound a welcome note of criticism of the objective theory when he says that the proponents of this theory, in denying the possibility of considering that an organ acting in conformity with its internal duties can be at fault, pay insufficient attention to the fact that the same organ may still be at fault from the standpoint of international obligations. But the theme is not developed as extensively as it might be. Only Strisower, in his well-known report on State responsibility for damage caused to aliens, presented at the Lausanne session of the Institute of International Law in 1927, tried effectively to uphold his view that a fault of the State, construed as a lack of diligence on the part of its organs, is a necessary prerequisite for its responsibility; but in his case, too, this was done by means of arguments deduced from a study of practice, rather than by means of a theoretical demonstration of the error of the opposite view. And it is a known fact that the conflict between the two schools of thought, which came to a head during the discussion of the report at the Lausanne session, did not by any means serve as an opportunity for a logical refutation of the objective theory, but had to be resolved on a majority basis with a kind of compromise, that is, with the triumph in principle of the theory in favour of fault, an exception being made for cases in which responsibility without fault is established by a special rule, which might be conventional or even customary.

Between the two extremes of opinion—based, in one case, on a logical set of arguments considered unassailable and, in the other case, mainly on the difficulty of making practice fit into the framework of a purely objective theory of responsibility—it was only natural, therefore, that middle courses and attempts at conciliation should have been tried. First of all, there was the Benjamin doctrine, according to which the principle of fault would apply in cases of responsibility of the State for its own acts, while it would have to be rejected in cases of responsibility for acts committed by individuals in its territory. A similar view was held by Buxbaum, to the effect that fault would be a necessary prerequisite for direct international offences, i.e. those committed by State organs acting within the bounds of their domestic competence; while for indirect

offences, i.e. those committed by non-competent organs, fault on the part of the State would not be required. Almost diametrically opposed is the view advanced by Schoen, and subsequently accepted by Fedozzi, de Visscher and Ruegger, which supports the original objective doctrine in cases of so-called responsibility for acts committed by organs, and rejects that doctrine in favour of the view that responsibility is linked to fault in cases of so-called responsibility for acts of individuals. Strupp only slightly broadens the scope allowed to fault by Schoen, accepting the view of objective responsibility in general for all offences of commission attributable to organs of the State, while maintaining that, for offences of omission, a customary rule deriving from practice could constitute a departure from the general rule and establish responsibility for fault. Another separate theory is that held by Jess, who, as regards the consequences of responsibility, makes a clear distinction between reparation—due only in cases of State responsibility for wrongful acts by organs—and satisfaction—also-required in cases which he describes as cases of direct State responsibility for acts by individuals—and maintains that, as for the obligation to make reparation, fault is a prerequisite, while, as regards the obligation to give satisfaction, the principle of responsibility for risk must be applied. Lastly, mention may be made of the view expressed by Balladore-Palmer, who contends that the sole prerequisite for the existence of an internationally wrongful act is conduct on the part of a national at variance with an international rule, but states at the same time that, for an *ex-delicto* obligation to arise, or for obligations to arise regarding compensation for damages or moral satisfaction, conduct at variance with the international rule should be the determining factor only if such conduct is culpable.

The clear conclusion is that a very considerable body of theories exists, although only the best known and most fundamental ones are mentioned here. And these theories and trends undoubtedly contain, for the most part, elements of truth and useful features, but precisely because of their variety, they clearly show the need for a review of the premises that will help to reveal the cause of so many different opinions and lead to a construction which, from all points of view, may seem more satisfactory.<sup>682</sup>

494. The division of international law doctrine concerning the basic foundation of international responsibility between supporters of the "fault theory" and supporters of the "objective theory" continued after the Second World War. Among writers frequently referred to as favouring, in general, the "fault" approach, the following could be mentioned: Accioly,<sup>683</sup> Ago,<sup>684</sup> Briery,<sup>685</sup> Carlebach,<sup>686</sup> Cavare,<sup>687</sup> Dahm,<sup>688</sup> Favre,<sup>689</sup> Garde Castillo,<sup>690</sup> Hostie,<sup>691</sup> Levin,<sup>692</sup> Miele,<sup>693</sup> Morelli,<sup>694</sup> Oppenheim (Lauter-

pacht),<sup>695</sup> Redtslob,<sup>696</sup> Rolin,<sup>697</sup> Ross,<sup>698</sup> Sperduti,<sup>699</sup> Verdross,<sup>700</sup> Vitta,<sup>701</sup> Von der Heydte,<sup>702</sup> etc. On the other hand, such writers as the following are frequently mentioned as supporters/in general of the "objective" theory: Brownlie,<sup>703</sup> Coussirat-Coustère and Eisemann,<sup>704</sup> Delbez,<sup>705</sup> Elynyshev,<sup>706</sup> Grieg,<sup>707</sup> Guggenheim,<sup>708</sup> Kelsen,<sup>709</sup> Kuhn,<sup>710</sup> Lévy,<sup>711</sup> Jimenez

<sup>690</sup> J. Garde Castillo, "El acto ilícito internacional", *Revista española de derecho internacional* (Madrid), vol. III, No. 1 (1950), pp. 130 and 137.

<sup>691</sup> J. F. Hostie, "The Corfu Channel Case and international liability of States", *Liber amicorum of congratulations to Algot Bagge* (Stockholm, Norstedt, 1956), p. 93.

<sup>692</sup> D. B. Levin, *Otvetsvennost gossudarstv v sovremennom mezhdunarodnom prave* (Moscow, Mezhdunarodnye otnoshenia, 1966), pp. 58–63. P. M. Kuris seems also to support the general approach of the "fault theory" (see *Mezhdunarodnye pravonarushenia i otvetstvennost gossudarstva* (Vilnius, Mintis, 1973), pp. 224–231).

<sup>693</sup> M. Miele, *Principi di diritto internazionale*, 2nd ed. (Padua, CEDAM, 1960), p. 243.

<sup>694</sup> G. Morelli, *Nozioni di diritto internazionale*, 2nd ed. (Padua, CEDAM, 1955), pp. 328–331.

<sup>695</sup> L. Oppenheim, *International Law: A Treatise*, 8th ed. (rev. Lauterpacht) (London, Longmans, Green, 1955), vol. I, p. 343.

<sup>696</sup> R. Redtslob, *Traité de droit des gens* (Paris, Sirey, 1950), p. 230.

<sup>697</sup> H. Rolin, "Les principes de droit international public", *Recueil des cours ... 1950–II* (Paris, Sirey, 1951), vol. 77, pp. 445–446.

<sup>698</sup> A. Ross, *A Textbook of International Law: General Part*, (London, Longmans, Green, 1947), p. 256.

<sup>699</sup> G. Sperduti, "Sulla colpa in diritto internazionale", in: *Istituto di diritto internazionale e straniero della Università di Milano, Comunicazioni e Studi*, vol. III (Milan, Giuffrè, 1950), pp. 81 *et seq.*

<sup>700</sup> A. Verdross, *Völkerrecht*, 5th ed. (Vienna, Springer, 1964), p. 376.

<sup>701</sup> E. Vitta, *La responsabilità internazionale dello Stato per atti legislativi* (Milan, Giuffrè, 1953), p. 41.

<sup>702</sup> F. A. von der Heydte, *Völkerrecht: Ein Lehrbuch* (Cologne, Verlag für Politik und Wirtschaft, 1958), vol. I, pp. 313–314.

<sup>703</sup> I. Brownlie, *Principles of Public International Law*, 2nd ed. (Oxford, Clarendon Press, 1973), p. 426.

<sup>704</sup> V. Coussirat-Coustère and P. M. Eisemann, "L'enlèvement de personnes privées et le droit international", *Revue générale de droit international public* (Paris), vol. LXXVI, No. 2 (April-June 1972), pp. 370–371.

<sup>705</sup> L. Delbez, *Les principes généraux du droit international public*, 3rd ed. (Paris, Librairie générale de droit et de jurisprudence, 1964), p. 366.

<sup>706</sup> V. N. Elynyshev, "Vina v mezhdunarodnom prave", *Sovietskoie gossudarstvo i pravo* (Moscow), No. 3 (March 1972), pp. 123–127.

<sup>707</sup> D. W. Greig, *International Law* (London, Butterworths, 1970), p. 399.

<sup>708</sup> P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1954), vol. II, pp. 51–52.

<sup>709</sup> H. Kelsen, *Principles of International Law*, 2nd ed. (New York, Rinehart and Winston, 1966), pp. 201–202.

<sup>710</sup> M. Kuhn, *Verschuldens- oder Verursachungshaftung der Staaten im allgemeinen Völkerrecht* (Frankfurt-am-Main, Photo-Landa, 1961), (thesis), p. 99.

<sup>711</sup> D. Lévy "La responsabilité pour omission et la responsabilité pour risque en droit international public", *Revue générale de droit international public* (Paris), 3rd series, vol. XXXII, No. 4 (Oct.–Dec. 1961), p. 746.

<sup>682</sup> *Ibid.*, p. 177–189. See also *id.*, "Le délit international" – *Recueil des cours ... 1939–II* (Paris, Sirey, 1947), vol. 68, pp. 477 *et seq.*

<sup>683</sup> H. Accioly, "Principes généraux de la responsabilité internationale d'après la doctrine et la jurisprudence", *Recueil des cours ... 1959–I* (Leyden, Sijthoff, 1960), vol. 96, pp. 353 and 364.

<sup>684</sup> R. Ago, "La colpa nell'illecito internazionale", *loc. cit.*, pp. 177 *et seq.*; and "Le délit international", *loc. cit.*, pp. 476–498.

<sup>685</sup> J. L. Briery, *The Law of Nations*, 6th ed. (rev. Waldock) (Oxford, Clarendon Press, 1963), p. 289.

<sup>686</sup> A. Carlebach, *Le problème de la faute et sa place dans la norme du droit international* (Paris, Librairie générale de droit et de jurisprudence, 1962), pp. 98 *et seq.*

<sup>687</sup> L. Cavaré, *Le droit international public positif*, 3rd ed. (Paris, Pedone, 1969), vol. II, p. 447.

<sup>688</sup> G. Dahm, *Völkerrecht* (Stuttgart, Kohlhammer, 1961), vol. III, pp. 224 *et seq.*

<sup>689</sup> A. Favre, "Fault as an element of the illicit act", *Georgetown Law Journal* (Washington, D.C.), vol. 52, No. 3 (Spring 1964), pp. 557–567.

de Aréchaga,<sup>712</sup> O'Connell,<sup>713</sup> Meron,<sup>714</sup> Maryan Green,<sup>715</sup> Perret,<sup>716</sup> Ruzié,<sup>717</sup> Sereni,<sup>718</sup> Schwarzenberger,<sup>719</sup> Starke,<sup>720</sup> Steiniger,<sup>721</sup> Zannas,<sup>722</sup> etc. In addition to those main trends, wide variations or interpretations of them, as well as other intermediate or conciliatory explanations, continue also to be advanced by contemporary writers. Moreover, many of those writers conclude their observations on the matter by affirming that, in their original purity at least, neither of the two main trends described above provides an adequate response to all cases of international responsibility.<sup>723</sup>

495. To present the question of the theoretical justifications of *force majeure* and fortuitous event, it does not seem necessary to dwell on the arguments set forth by writers in favour of or against the "fault theory" or the "objective theory". The introduction so far made on the matter already provides, it would seem, the required perspective. Some further clarification should, however, be added, in order to facilitate a better understanding of particular justifications given by individual writers or groups of writers—within each of the main theories mentioned above—concerning the preclusion of wrongfulness by *force majeure* and fortuitous event. Such clarifications relate to the following four questions: (1) the meaning of the term "fault"; (2) the meaning of the expression "objective responsibility"; (3) the distinction between "acts" and "omissions"; (4) the role played by the "element of fault" in a system of international responsibility based upon the concept of the "internationally wrongful act".

<sup>712</sup> E. Jiménez de Aréchaga, "International responsibility", *Manual of Public International Law*, ed. Sørensen (London, Macmillan, 1968), pp. 534–535.

<sup>713</sup> D. P. O'Connell, *International Law*, 2nd ed. (London, Stevens, 1970), vol. II, pp. 943, 944 and 955.

<sup>714</sup> T. Meron, "International responsibility of States for unauthorized acts of their officials", *The British Year Book of International Law*, 1957 (London), vol. 33 (1958), p. 96.

<sup>715</sup> N. A. Maryan Green, *International Law—Law of Peace* (London, Macdonald and Evans, 1973), p. 243.

<sup>716</sup> Perret, *op. cit.*, pp. 149 and 202.

<sup>717</sup> D. Ruzié, *Droit international public* (mémentos Dalloz) 2nd ed. (Paris, Dalloz, 1975), p. 67.

<sup>718</sup> A. P. Sereni, *Diritto internazionale* (Milan, Giuffrè, 1962), vol. III, p. 1515.

<sup>719</sup> G. Schwarzenberger, *International Law*, 3rd ed. (London, Stevens, 1957), vol. I, pp. 632–652.

<sup>720</sup> J. G. Starke, *An Introduction to International Law*, 7th ed. (London, Butterworths, 1972), pp. 309–310; and "Imputability in international delinquencies", *The British Year Book of International Law*, 1938 (London), vol. 19, pp. 114–115.

<sup>721</sup> P. A. Steiniger, "Die allgemeinen Voraussetzungen der völkerrechtlichen Verantwortlichkeit der Staaten", *Wissenschaftliche Zeitschrift der Humboldt-Universität zu Berlin*, Gesellschafts- und Sprachwissenschaftliche Reihe (Berlin), vol. XXII, No. 6 (1973), p. 444.

<sup>722</sup> P. A. Zannas, *La responsabilità internazionale des Etats pour les actes de négligence* (Montreux, Ganguin et Laubscher, 1952) (thesis), pp. 47–50.

<sup>723</sup> See, for example, C. Rousseau, *Droit international public* (Paris, Sirey, 1953), pp. 359–361; Cavare, *op. cit.*, p. 482; Perret, *op. cit.*, p. 147; Favre, *loc. cit.*, p. 570; M. Giuliano, *Diritto internazionale* (Milan, Giuffrè, 1974), vol. I, pp. 591–592; A. Schüle, "Völker-

496. The first point requiring clarification relates to *the very meaning of the term "fault"*. For writers sharing the fault theory described above, that term refers to a certain state of mind of the organ concerned and, more specifically, to malicious intent (*dolus*) or culpable negligence (*culpa, stricto sensu*).<sup>724</sup> So understood, "fault" has a psychological connotation underlined by several of these writers as, for example, by Carlebach in the following passage: "It is man's internal qualities that make him capable of acting in accordance with an obligation, that is to say a minimum of qualities of mind and soul, whereby a man may be expected to avoid a wrongful act".<sup>725</sup> Another example may be found in Favre, for whom "fault"

... presupposes that the actor has the capacity to act freely and to discern the consequences of his acts. Fault results from behaviour which constitutes a transgression of the norm of conduct prescribed by the rule of law, by a failure of the wrongdoer's volition; the wrongdoer could have, and should have, acted other than as he did. He is thus charged with the act—he is liable for it. The failure to observe the legal duty justifies reprobation of the wrong-

rechtliches Delikt", *Wörterbuch des Völkerrechts* (Strupp-Schlochauer), 2nd ed., (Berlin, de Gruyter, 1960), vol. I, p. 336; Lévy, *loc. cit.*, p. 746; K. Furgler, *Grundprobleme der völkerrechtlichen Verantwortlichkeit der Staaten* (Zürich, Polygraphischer Verlag, 1948) (thesis), p. 96. Furgler concludes, for example, that international law does not follow either the theory of pure fault nor that of an objective responsibility of States, but considers that, in general, no fault is needed for the responsibility of the State (*ibid.*, p. 99). In an article published recently, Konstantinov states in this connexion the following:

"The dilemma, where the subjective and objective theories are concerned, is that each of them in isolation covers, or makes into the decisive factor, only one or the other manifestation of a State act—i.e., its objective or subjective aspect. These theories leave out of account the fact that a politically motivated State act, which is a socio-political manifestation of objective reality, has two aspects—one objective and the other subjective—that dialectically condition each other. The only possible starting-point for an investigation of the subjective conditions of responsibility which are grounded in the person of the State is the politically motivated State act, with its objective and subjective aspects, as a socio-political process of objective reality." (E. Konstantinov, "Schuld im Völkerrecht", *Wissenschaftliche Zeitschrift der Humboldt-Universität zu Berlin*, Gesellschafts- und Sprachwissenschaftliche Reihe (Berlin), vol. XXIV, No. 3 (1975), p. 293).

<sup>724</sup> The term "*culpa*" is normally used by those writers *lato sensu* to cover the concept of *dolus* (malicious intent), as well as *culpa stricto sensu* (culpable negligence). As Sperduti says:

"In order to understand the meaning of the words, it should be noted that experts in international law generally speak of '*culpa*' (fault) without any adjunct, or of '*culpa lato sensu*' (fault in the broad sense), to indicate the *genus* of which '*dolus*' and '*culpa stricto sensu*' (fault in the strict sense) are the specific terms. This terminology does not coincide with that preferred by experts in penal law, who indicate the *genus* as 'guilt' and the two specific terms as '*dolus*' and simply '*culpa*'" (Sperduti, *loc. cit.*, p. 82). [Translation by the Secretariat.]

The same applies to the terms "*faute*", "fault" and "*falta*", used by French, English and Spanish writers. In German doctrine, "*culpa lato sensu*" is generally called "*Verschulden*" and "*culpa stricto sensu*" "*Fahrlässigkeit*" (see, for example, Dahm, *op. cit.*, pp. 224 *et seq.*). The Latin expressions "*culpa lata*", "*culpa levis*" and "*culpa levissima*" are also used in international law by some writers to describe the various possible degrees of *culpa* ("fault"). For the question of *culpa levissima* in general international law, see, for example, Ago, "Le délit international", *loc. cit.*, pp. 497–498; and R. Luzzatto, *loc. cit.*, pp. 91–93.

<sup>725</sup> Carlebach, *op. cit.*, p. 98.

doer and brings a legal claim for redress; it takes on a moral tint. Considered in this way, fault has a subjective sense. Implementing the responsibility of the actor comes to depend on an evaluation of the psychic factors governing his behaviour; the act will be judged according to the personality of the agent.<sup>726</sup>

But the above-mentioned writers underline also that "subjective fault" does not imply a mere psychological relationship between the wrongdoer and the resulting material injury. It is rather, as indicated by Luzzatto, "a psychological relationship vis-à-vis a rule",<sup>727</sup> a point stressed by Ago in the following definition:

... although it is true, as we have concluded, that the action and the will of the State can only be the action and will of its organs, it follows that in international law we may speak of a fault of the State when this psychological relationship, into which we have seen fault translated, subsists between the conduct in conflict with an international legal obligation of the State and the person of the organ engaging in it.<sup>728</sup>

497. Such a "subjective fault" is looked at by those writers as a distinct constituent condition for the establishment of "an internationally wrongful act", very close to the "subjective element" of such an act (*attribution* or *imputation*), as is illustrated in the statements quoted below:

Ago:

Another preliminary point, which must be clearly put, is that of the logical moment at which the problem of fault appears. It may in fact be opportune to stress the fact that our question relates specifically to the primary juridical procedure which consists of imputing a wrongful act to a subject, and not that secondary juridical procedure which consists of imputing to a subject the juridical consequences of the wrong, that is to say, responsibility, the situation of being required to provide reparation or to suffer a penalty. It is not a question of deciding whether, given a subject's wrongful act already defined as such, it is also necessary that there should exist the element of fault in order to bring about responsibility; but rather whether, given the existence of conduct that conflicts objectively with an obligation of the State under international law, the circumstance of fault by an organ is necessary for an internationally wrongful act to be imputed to the State itself. ...

... the problem consists precisely in determining whether the existence, between the perpetrator of the injury to a subjective international right and the injury itself, of a psychological link characterized in one of the two typical forms of malicious intent or fault *stricto sensu* is or is not to be regarded as a necessary condition for imputing to a subject an internationally wrongful act ...<sup>729</sup>

<sup>726</sup> Favre, *loc. cit.*, pp. 560-561.

<sup>727</sup> Luzzatto, *loc. cit.*, p. 66. The writer points out:

"... it is customarily held that fault does not consist solely of this psychological link between agent and material injury or in mere transgression of a command. Not the former, because that—narrowly interpreted and without reference to the conduct being a breach of specific rules of behaviour—takes no cognizance of the foreseeability of the injurious consequences or of the possibility of preventing them, precluding [an] explanation of how it is possible to make an imputation other than a purely objective one when the agent has neither foreseen nor desired the event." (*ibid.*, pp. 65-66).

<sup>728</sup> Ago, "Le délit international" (*loc. cit.*, p. 486).

<sup>729</sup> *Ibid.*, pp. 486-487. The writer adds:

"... no logical reason prevents the international juridical order from taking account of the wilful character of the offence committed by the organ, and giving a juridical value to the latter's malicious intent or fault, so as to condition the affir-

Carlebach:

Imputability, as an element of fault, is often neglected in comparison with special elements of the fault, that is to say with the attitude properly so-called of the actor towards the act itself. This special element is *intent* or *negligence*. An act is *intentionally* committed when the actor was aware of all the circumstances designated by the norm as conditions for the sanction, recognized their importance, and willed or approved the act. Knowing and willing: an act of knowledge and an act of feeling.<sup>730</sup>

498. There are, however, other international law writers who also use the term "fault" but attach to it meanings which do not correspond to the notion of subjective fault mentioned above.<sup>731</sup> Among these various meanings, the more far-reaching, for the subject-matter of this survey, is the one reflected in such statements as the following:

Fauchille:

[Fault is] what one does without having the right to do or what one neglects to do when one has a duty to do it,<sup>732</sup>

Salvioli:

If there is a wrongful act, there is fault, the fault consisting in the violation of a rule of law. The things are one and the same;<sup>733</sup>

and Bourquin:

The so-called subjective fault also becomes part of the actual content of the obligation; it is stripped of its psychological nature and takes on a purely objective character.<sup>734</sup>

499. When used in that "objective" or "normative" meaning, the term "fault" tends to become synonymous with "violation of law" or "omission of duty" and with failure to observe one's legal obligation, and to become equivalent to the "objective element" (*breach of the obligation*) of the internationally wrongful act, or with the internationally wrongful act itself.<sup>735</sup> It should be added, however, that among writers adopting such a definition of fault there are some, for example, Cheng, who consider that the term "fault" is not devoid of significance, for it brings to light the element of freedom of action (*wilfulness*). But it is clear that, for all writers sharing an "objective" or "normative" concept of fault such a term has a very different meaning than the "subjective fault" of the organ referred to by the followers of the "fault theory", because it excludes the element of

mation of the existence of an internationally wrongful act on the part of the State" (*ibid.*, p. 490).

<sup>730</sup> Carlebach, *op. cit.*, p. 99.

<sup>731</sup> For the several meanings attached to the term "fault" (*culpa*) in international law, see, Accioly, *loc. cit.*, pp. 364-370. For example, G. Scelle in his *Manuel de droit international public* (Paris, Domat-Montchrestien, 1948, pp. 912 *et seq.*) accepts a "subjective" concept of fault not in the sense of "culpa" in Roman law, but rather in that of "*faute de service*" of French administrative law.

<sup>732</sup> P. Fauchille, *Traité de droit international public*, 8th ed. (Paris, Rousseau, 1922), vol. I, part one, p. 515.

<sup>733</sup> G. Salvioli, "Les règles générales de la paix", *Recueil des cours ... 1933-IV* (Paris, Sirey, 1934), vol. 46, p. 97.

<sup>734</sup> M. Bourquin, "Règles générales du droit de la paix", *Recueil des cours ... 1931-I* (Paris, Sirey, 1932), vol. 35, p. 218.

<sup>735</sup> "The concept of fault as the violation of a pre-existing obligation is, however, superfluous, because it reiterates the *objective element* of the *internationally wrongful act*" (Jiménez de Aréchaga, *loc. cit.*, p. 535).

malicious intent or culpable negligence. As pointed out by Cheng, "... the only constitutive elements of fault are the will, the act, and the unlawfulness thereof ... Malice and negligence can neither be identified with, nor are they inherent in, the notion of fault. Fault is dependent upon the existence of the will, but not upon that of malice or negligence".<sup>736</sup>

500. The second point deserving further clarification concerns the meaning of the expression "objective responsibility", called sometimes "causal responsibility", used by the writers identified above as favouring the "objective theory". It goes without saying that for those writers the psychological attitude of the organ is immaterial.<sup>737</sup> As Bourquin says, "... the theory of international responsibility is in no way bound to the notion of fault in the traditional sense of the word".<sup>738</sup> Starke says that the rules of international law do not contain "a general floating requirement of malice or culpable negligence as a condition of responsibility".<sup>739</sup> Other "objectivists", such as Guggenheim,<sup>740</sup> Jiménez de Aréchaga,<sup>741</sup> etc., write in the same sense. Another example is the following sentence by Meron: "The cases considered seem to suggest that not only is an element of malice not essential to the establishment of responsibility, but even a total absence of fault will not be fatal to the claim."<sup>742</sup> For all those writers, what actually matters is the exterior conduct adopted by the organ *per se* compared to what is provided for in the international legal obligation concerned. Thus, the supporters of the "objective theory" consider that, in principle, a State is responsible for the breach of the

international obligation without there being any necessity to look for an additional psychological failure on the part of the organ.

501. The adoption of the expression "objective responsibility" or "causal responsibility"<sup>743</sup> by the writers referred to above does not mean, however, that they try to apply the concept of international liability to injurious consequences arising out of certain acts not prohibited by international law. Such an international liability, based on the notion of the risk created by the activities concerned, frequently accompanies the concept of "absolute responsibility", while the "objective responsibility" referred to here implies the breach of a pre-existing international obligation of the State, namely an "internationally wrongful act". In other words, responsibility is viewed by the writers concerned as "objective" or "causal" because it is considered independent of any proof of "subjective fault" on the part of the organs of the State, but it is a responsibility which arises always as a consequence of an international wrong. As is pointed out by Lévy:

To reject fault as a condition of responsibility is not necessarily to be led to adopt responsibility on the ground of risk. In reality, there is a contradiction between two conceptions of responsibility: the subjective and the objective; responsibility for fault is simply an example of subjective responsibility, and responsibility on the ground of risk is simply the most extreme instance of objective responsibility.<sup>744</sup>

In the same sense, Quadri states:

... it is first necessary to distinguish between "responsibility" and "guarantee" ... When conduct is lawful, there can never be a question of responsibility but only of guarantee. The problem of guarantee must be approached in a different spirit, failing which its basis will be totally distorted and elements disturbing to international life will be introduced into practice.<sup>745</sup>

Even before the Second World War, writers emphasized the convenience of distinguishing between "objective responsibility" and "responsibility for risk" as Borchard did in the following passage: "It would be better to confine the term '*Erfolgshaftung*' [responsibility for risk] to injuries for which responsibility is imputed without evidence of any wrongful act on the part of the State".<sup>746</sup> A certain observable terminological hesitation on the matter<sup>747</sup> should not be allowed to obscure the distinction just made, in particular because the scope and *modus operandi* of exonerating circumstances, such as *force majeure* and fortuitous event, are not the same in the case of objective responsibility and in the case of responsibility

<sup>736</sup> Cheng, *op. cit.*, pp. 225 and 227.

<sup>737</sup> "... the doctrine of fault—if such a doctrine is possible—can consist of the analysis of the conduct only of actual physical persons. Such an analysis is even justified from the viewpoint of the existence of the international responsibility of physical persons for crimes against peace and against mankind. However, such an analysis is not only unnecessary but may be quite harmful in the case of inter-State relations, since it focuses attention on questions of a secondary nature ... Fault is an exclusively psychological concept and presupposes the existence of consciousness, will and intellect in the subject acting intentionally or negligently ..." (Elynychev, *loc. cit.*, p. 124).

<sup>738</sup> Bourquin, *loc. cit.*, p. 218.

<sup>739</sup> Starke, "Imputability", *loc. cit.*, pp. 114–115.

<sup>740</sup> P. Guggenheim, "Les principes de droit international public", *Recueil des cours ... 1952–I* (Paris, Sirey, 1953), vol. 80, pp. 147 *et seq.*

"Positive international law attaches the penalty to the breach of an objective rule. It does not, therefore, base the responsibility of the community on the culpability of the organ. This is the conclusion to which one is led by the examination of the decisions of arbitral tribunals, and more particularly of the decisions of the Permanent International Court of Justice. The latter, in its first decision, in which the question at issue was whether Germany had been justified in refusing to allow the steamship *Wimbledon* to pass through the Kiel Canal, would have had an opportunity to consider the question of the culpability of the organs which refused to allow the passage. It refrained from doing so, however, and based the sanction solely on the objective violation of article 380 of the Versailles Treaty of Peace. In later cases, the Court consistently adhered to this precedent" (Guggenheim, *Traité ... op. cit.*, pp. 52–53).

<sup>741</sup> Jiménez de Aréchaga, *loc. cit.*, pp. 534–537.

<sup>742</sup> Meron, *loc. cit.*, p. 96.

<sup>743</sup> Certain writers consider, at least for some hypotheses, the expression "causal responsibility" more appropriate than the expression "objective responsibility" (see, for example, Favre, *loc. cit.*, p. 560).

<sup>744</sup> Lévy, *loc. cit.*, p. 748.

<sup>745</sup> R. Quadri, "Cours général de droit international public", *Recueil des cours ... 1964–III* (Leyden, Sijthoff, 1966), vol. 113, p. 463.

<sup>746</sup> E. M. Borchard, "Theoretical aspects of the international responsibility of States", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Berlin), vol. I, part one (1929), p. 227.

<sup>747</sup> Kelsen, for example, uses the expression "absolute responsibility" when dealing with international wrongs (*op. cit.*, p. 202).



for risk.<sup>748</sup> Actually, under the latter system, the exceptions of *force majeure* and fortuitous event are very often substantially modified and narrowed.<sup>749</sup>

502. The third clarification to be made relates to the distinction between "acts" and "omissions" and more specifically to the question of whether or not the general positions adopted by the "fault theory" and by the "objective theory", referred to above, need to be somewhat reviewed, in so far as "omissions" are concerned. Generally speaking, fault theory considers that "subjective fault", in the form of culpable negligence, is also required in the case of omissions as a distinct condition for the establishment of an international wrong. Such a position is reflected, for example, in the statements quoted below:

Ago:

Similarly, we must emphasize the fact, so opportunely stressed in the doctrine of the law of States, that the voluntary element the necessary nature of which in connexion with any internationally wrongful act has been proved, is present in omission, as well as in action. Although in many instances omission as such is not wilful on the part of the organ perpetrating it, nevertheless the voluntary element still exists, because it is not that the omission in itself should have been willed that is necessary, but that the conduct which was followed and which was different from that called for by the legal obligation should have been willed.<sup>750</sup>

Carlebach:

Apart from intent, which we have no difficulty in recognizing as an element of fault, it is usual to present *negligence* as a form of culpability ... [and, after referring to certain aspects of the "positive psychological character" of negligence:] ... all these are in fact only forms of intent, since disregard of and obligation where one is aware that it exists represents that acceptance of a wrongful act that constitutes intent ... It follows from this that, although negligence does not involve any active interior behaviour by the agent as regards his offence, wrongfulness through neglect nevertheless involves, because of the need for imputability, an element of positive psychic action that can be termed fault. If, however, imputability was characterized not as an element in fault but possibly as a simple condition of it—which amounts basically to the same thing—we would have to deny the presence of a positive element of fault, namely negligence. The insertion of imputability into the rule of law would then remain a problem.<sup>751</sup>

Perrin:

... Certainly, negligence can be unconscious. In that case, however, it is this unconsciousness itself which implies the breach of an obligation in a field in which intelligence is assumed to enlighten the will. The author of the damage, if he did not foresee it, could and should have foreseen it by the simple exercise of his

faculties. Negligence, therefore, is a form of fault, since it is an inaction that the will could have avoided ...<sup>752</sup>

503. On the other hand, writers adhering to the "objective theory" consider that the basic assumption of such a theory also applies in the case of omission. "Negligence" is not presented by them as a form of subjective fault, but as the non-fulfilment of the duty established by the substantive obligation concerned.<sup>753</sup> Frequently, they link the concept of "negligence" to a breach of an international obligation of vigilance imposing a duty of "due diligence" on the part of the State.<sup>754</sup> The passages quoted below give some examples of this approach:

Zannas:

We have seen that negligence can only be conceived in relation to a rule of conduct. It is impossible to disregard the objective violation of the rule of law, and it is in the last analysis to the latter that any instance of negligence must relate.

Negligence in the realm of international law also relates to a standard of conduct. Here again, the organ of the State is bound to follow a rule of conduct imposed by the law; it is under an obligation to display the amount of care demanded by the juridical order.

<sup>752</sup> G. Perrin, "L'aggression contre la légation de Roumanie à Berne et le fondement de la responsabilité internationale dans les délits d'omission", *Revue générale de droit international public* (Paris), 3rd series, vol. XXVIII, No. 3 (July–Sept. 1957), p. 424.

<sup>753</sup> That it is possible in such cases to make certain "analogies commodes" with the concept of "fault" (subjective fault), has been recognized by Anzilotti, but he concludes that:

"The want of diligence is non-observance of the duty imposed by international law, without there being any reason to speak of fault in the proper sense of the word. The State which acted with due diligence is not responsible; but the absence of responsibility does not depend on an absence of fault, it results from the fact that there has been no act contrary to the law of nations" ("La responsabilité internationale ...", *loc. cit.*, p. 291).

For Eagleton,

"... lack of [proper] diligence may perhaps be regarded as a fault; but it is the employment of such private law concepts as this which has produced so much confusion as to responsibility in international law" (C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), p. 213.

<sup>754</sup> Some "subjectivist" writers underline likewise the relationship between "negligence" and the breach of international obligations imposing a duty of "due vigilance" on the part of the State. They speak, however, of fault (*culpa*), even in cases of non-fulfilment of such kinds of duties, as for example, in the following passage:

"... it is considered preferable to speak of a subject's responsibility for his own wrongful, criminal or culpable act, when the objective and subjective element—the practical and psychological aspect—of violating the law are combined in him, when, in other words, the subject is held accountable for behaviour of his own which is both injurious to legally protected interests—and consequently contrary to one of his duties—and psychologically occasioned by his malice or fault; on the other hand, it is considered preferable to speak of a subject's responsibility only for fault when responsibility is imputed to him for an injury not inflicted by him, solely because he had not done everything he ought to have done in order to ensure that the injury, precisely as an injury not inflicted by him, should not happen: when, therefore, responsibility arises from the violation of a duty in this strictly functional sense ..." (Sperduti, *loc. cit.*, p. 93).

<sup>748</sup> On the meaning of expressions such as "fault liability", "strict liability", "absolute liability" and of legal concepts like "*ex gratia* payments", "products liability", "operating liability" and "absolute liability subject to maximum damages", see L. F. E. Goldie, "Liability for damage and the progressive development of international law", *International and Comparative Law Quarterly* (London), vol. 14, part 4 (October 1965), pp. 1196–1220.

<sup>749</sup> See paras. 106 to 117 above.

<sup>750</sup> Ago, "Le délit international", *loc. cit.*, p. 502.

<sup>751</sup> Carlebach, *op. cit.* pp. 99, 100 and 101.



It is probable that responsibility in these cases presents affinities with the traditional concept of fault (with the concept in the French Civil Code, for example). However, we may note with Bourquin that "this culpable element is confused with the actual breach of the international obligation, or—perhaps more exactly—that the notion of *disregard of the international obligation* may be understood in such a way as to absorb the idea of fault and thus render superfluous the retention of that idea as a distinct and necessary condition for the responsibility of the State".

Responsibility rests only through a breach of the international obligation. The whole difficulty lies, therefore, in defining the duty of diligence demanded by the international order.<sup>755</sup>

#### Guggenheim:

Objective responsibility also provides the basis for imputing to the State delicts of omission, that is, delicts due to the negligence of the organs of the State. Making the notion of negligence objective creates for the collectivity a duty of vigilance and diligence.<sup>756</sup>

However, one thing appears certain to me: that is that the fault of omission is never a lapse due to the subjective negligence of the organ, but always constitutes the breach of an objective rule, that is to say of the diligence demanded in the case in point by international law. Contrary to a widely held opinion, therefore, it is possible both to accept causal responsibility for delicts of omission and to see, in the breach of obligations of prevention, negligence, the criteria for which are provided by objective elements exclusively, without there being any need to draw upon the subjective notion of culpability.<sup>757</sup>

#### Sereni:

... Now, it is obvious that in cases of this kind the international rules which were alleged to have been violated were not rules that laid down that a State was responsible simply because certain events—attempted assassinations, mob violence, military expeditions—happened; to prevent them would in many instances not have been humanly possible; they were, in fact, rules which imposed on States the obligation to exercise due diligence with a view to preventing the occurrence of such events and to punish those who committed the acts in question if and when they happened. Accordingly, if fault is mentioned in these cases, and diplomatic correspondence and occasional decisions do use this term, all that is intended by the term is to express concisely the idea that the State is in default for not having exercised due diligence to prevent the occurrence of such events.<sup>758</sup>

504. The concept of negligence to which reference is made in the paragraphs above is also shared by writers who use the term "fault" but give to that term the meaning of "breach of the obligation" or of "wrongful act". The following passage by Cheng illustrates the point:

<sup>755</sup> Zannas, *op. cit.*, pp. 47–48.

<sup>756</sup> Guggenheim, *Traité ... (op. cit.)*, p. 54.

<sup>757</sup> *Id.*, "Les principes ..." (*loc. cit.*), p. 149.

<sup>758</sup> Sereni, *op. cit.*, pp. 1520–1521. In the same sense, H. Kelsen says:

"[Negligence] is not the specific qualification of a delict, it is a delict itself, the omission of certain measures of precaution, and that means the non-exercise of the degree of care that ought to be exercised according to the law. Negligence is a delict of omission, and responsibility for negligence is rather a kind of absolute responsibility than a type of culpability" (H. Kelsen, *General Theory of Law and State* (Cambridge, Mass., Harvard University Press, 1945), p. 66).

Negligence, or culpable negligence, is, therefore, the failure to perform a legal duty, i.e., a pre-existing obligation prescribing the observance of a given degree of diligence. Being a default in carrying out an obligation, culpable negligence constitutes fault in the sense described above. In such cases, fault does consist in culpable negligence.<sup>759</sup>

505. In other cases, however, the position of international law writers on the question of "wrongful omissions" and the notion of "negligence" cannot be explained merely by a reference to the distinction between the "fault theory" and the "objective theory". First, as the statements quoted below indicate, there are writers who accept the requirement of "subjective fault" as a condition of "wrongful omissions", or of some of them, but not with regard to "wrongful acts":

#### Strupp:

This approach is the only one in conformity with the notion that if, for wrongful *acts* of commission, we can in fact conceive of a responsibility relating only to the bare facts, we cannot, on the other hand, disregard the subjective forces of the organ in question vis-à-vis the omissions, for which motives completely independent from and unknown to the will of the competent organs of the State may have led to what, objectively speaking, constitutes a breach of international law.<sup>760</sup>

#### De Visscher:

The absence of vigilance—which in your eyes constitutes *fault*—is in this case [responsibility of the State in case of injuries sustained by aliens in its territory as a result of acts committed by private individuals] the basis of international responsibility. ... in the great majority of cases, the lapse [by the State] will be constituted by an omission or a culpable abstention.<sup>761</sup>

#### Rousseau:

But on the other hand it must be recognized that this concept of fault [subjective fault] is the basis of many cases of international responsibility and constitutes a minimum notion; this is so whenever international judicial decisions base the responsibility of the State, not on the fact that the wrongful act has taken place, but on the circumstance that the State has not demonstrated the diligence that it should have displayed in order to prevent it (notion of *absence of due diligence*).<sup>762</sup>

506. On the other hand, there are writers who accept "subjective fault" in cases relating mainly to "wrongful acts", but express doubts as to the relevance of such a notion of "fault" with respect to "wrongful omissions". The following passage by Luzzatto provides an example of this attitude:

#### Luzzatto:

... In many cases, indeed, it is impossible to distinguish between

<sup>759</sup> Cheng, *op. cit.*, p. 226.

<sup>760</sup> K. Strupp, "Les règles générales du droit de la paix", *Recueil des cours ... 1934-1* (Paris, Sirey, 1934), vol. 47, p. 564.

<sup>761</sup> C. de Visscher, "La responsabilité des Etats", *Bibliotheca Visseriana* (Leyden, Brill, 1924), vol. II, pp. 93 and 103.

<sup>762</sup> Rousseau, *op. cit.*, p. 360.

the violation of a specific obligation imposed by a rule and the separate violation of an obligation in which, as has been said, fault is present *sensu lato*. . . . In other words, it is no longer possible to define the wrongful act as the violation of an international legal obligation with the addendum that the act must have been committed with malice or with fault; because it is precisely in the presence of these elements, and of them alone, that the "violation" arises and hence the wrongfulness.

This is what happens in all cases in which specific negligent conduct by a State may be held to be wrongful on the basis of *general international law*. They include all those hypothetical cases discussed in the literature, often under the heading of State responsibility "for acts of individuals", i.e., all cases of failure on the part of the organs of a State to perform the duty of exercising due diligence to prevent the commission of injurious acts against foreign States or citizens by private individuals. Here, the State's duty of diligence is described and defined in detail in relation to the duty of protecting foreign States and citizens, which thus constitutes a kind of specific instance of it. But it seems obvious that these are closely interwoven obligations, each existing by reference to the other, so that it would be impossible to treat them as two logically separate concepts without depriving them of their essential meaning . . .

. . . Nevertheless, in a whole series of cases—those constituting the wrongful acts of omission contemplated in general international law, there must be an attitude of the will against one of one's own duties of conduct, and this makes it reasonable to speak, in this case also, of fault as a prerequisite for the wrongful act. But the duty in question constitutes the only international obligation violated by the agent, so that it seems impossible to distinguish the subjective and objective elements of the wrongful act, as is easily done in the case of a violation by commission. In these circumstances, the element of truth is expressly stipulated by those who hold that these are cases of objective responsibility.<sup>763</sup>

507. It must also be pointed out that some followers of the "fault theory" consider that negligence is an "objective fault", in the sense that the psychological attitude of the organ of the State concerned should be measured according to certain external and objective criteria provided for by the law. The following passage by Perrin illustrates this position:

Negligence, therefore, is a form of fault . . . . But it is an objective fault. In fact, whereas so-called subjective fault requires an analysis of the real intention of the author of the damage, who is accused of having caused the damage deliberately, negligence is not

weighed in the light of the customs, opinions and sentiments of the individual committing it. It is measured, on the contrary, according to norms provided by an abstract model, that of the awareness attributed by juridical opinion to an enlightened mind. If an organ of the State is accused of negligence, its conduct will be compared to that which would have been followed in similar circumstances by the organ of a well-ordered State. The existence of negligence is established, therefore, by the use of an objective criterion.<sup>764</sup>

508. Such an "objective" notion of "negligence" should not, however, be identified with the concept of negligence referred to by writers who endorse the "objective theory" of international responsibility.<sup>765</sup> For the latter writers, negligence, in the form of "absence of due diligence", is not a standard against which "subjective" fault should be measured, but an "objective failure" to fulfil the content of an international obligation of conduct<sup>766</sup> which imposes upon States—in connexion, for example, with activities of individuals or foreign States in territories under the jurisdiction of the State—a duty to exercise a certain vigilance with "due diligence". The statements quoted below present this point of view:

Zannas:

The element of fault invoked to define the limits of the international obligation merges with the content of that same obligation. In defining the exact scope of the duty to exercise a certain diligence, the fault is identified with the violation of the international obligation whose limits are thus defined. The attitude of the State organ is of interest to international law only as being in conformity with or contrary to the law.<sup>767</sup>

Sereni:

Diligence, then, does not refer to the psychological state of the author of the unlawful act, but constitutes an objective criterion, a standard, of conduct which the subject must satisfy in relation to the circumstances; it can be determined by the judge by reference to the factual conditions; in short, diligence therefore refers to the content of the obligation which is to be respected and from the violation of which the unlawful act results. From this interpretation, it follows, *inter alia*, that when the subject has acted with due diligence, there can be no unlawful act, even though an event

<sup>763</sup> Luzzatto, *loc. cit.*, pp. 69, 70 and 77. The writer stresses that "Responsibility for omission, in the field of general international law, is accordingly directed at securing compliance with those rules which do not impose on States the attainment of a clearly defined result, but are intended to guarantee a certain comprehensive protection, the content of which and the means whereby it is achieved cannot be determined *a priori*, through the imposition of a general obligation to employ such diligence as is, in normal circumstances, sufficient to prevent the production of injury to the rights of other States.

"These are obligations to prevent, to safeguard, to protect, with a view to ensuring certain results for the attainment of which the State is left free to choose the means to be employed. The wrongful act derived from the violation of these obligations, according to a well-known classification, has the three-fold characteristic of being wrongful through omission, by virtue of the nature of the obligation violated, wrongful in the event and a compounded wrongful act. The attainment of the desired result is the end, but not the content, of the obligation violated, wrongful in the event and a compounded wrongful act. The attainment of the desired result is the end, but not the content, of the obligation imposed on the State" (*ibid.*, p. 80).

<sup>764</sup> Perrin, *loc. cit.*, p. 424.

<sup>765</sup> See paras. 494, 500 and 501 above.

<sup>766</sup> P. Reuter calls such an obligation of vigilance "a characteristic obligation of conduct" (*Droit international public*, 4th ed., (Paris, Presses universitaires de France, coll. Thémis, 1973), p. 182). The writer underlines that the rule of international law which provides that "States are not bound to guarantee the absence of all injury to foreign States and to their nationals, but only to take all the precautions that should normally ensure such an effect" is a rule "closely linked to the notion of territory" (*ibid.*).

<sup>767</sup> Zannas, *op. cit.*, p. 130. This writer points out that the French law concept of "negligence" refers to "a psychological attitude of the person", while in English law "negligence" is "an independent delict due to the breach of a duty of care". Taking as his own basis the English law notion of "negligence", he concludes that the three following factors are required to be present for "wrongful act" of "negligence": (1) the existence of circumstances that impose on the State the obligation to exercise a certain degree of care determined by international law (duty to take care); (2) the breach of this obligation, a breach resulting from the conduct of an organ of the State (standard of care); (3) an injury resulting from this breach (*ibid.*, pp. 41–44, 131–132).

injurious to another subject has occurred, because what the rule prescribes is a certain form of conduct, not the occurrence or non-occurrence of a given event.<sup>768</sup>

Delbez:

Negligence or acquiescence are related, in effect, to international standards of conduct derived from the notion of due or adequate diligence. This due diligence is, in the general argument, an objective rule of customary law. It can sometimes become an objective rule of conventional law, for example, as part of Convention No. XIII of The Hague on the rights and duties of neutral States. The absence of due diligence therefore constitutes, properly speaking, a breach of the objective law, or a wrongful act.<sup>769</sup>

509. Independently of the question whether the negligence resulting from the breach of an obligation of conduct (absence of due diligence) is a "separate delict"<sup>770</sup> or "an element of a delict existing in international law",<sup>771</sup> many writers stress that the degree of diligence "due" (standard) which is required by the international obligation of conduct may vary from one hypothesis to another, as well as in the light of the particular circumstances surrounding the case concerned.<sup>772</sup> The statement quoted below underlines the point:

Coussirat-Coustère and Eisemann:

Some elements may be identified to define the State's obligations of conduct: first, a standard of reference constituted by an average and sufficient degree of diligence; second, the non-conformity of the action of the State to the standard of conduct expected; lastly, the absence of any justifying cause. Nevertheless, the problem remains as regards the consistency of the standard of reference, the content of which would appear to depend to a large extent on the factual circumstances of the case. Should we also take into consideration only the rules of customary or conventional law, or on the contrary the rules deriving simply from "international comity"? Is it an instance of an absolute obligation or only of a mere obligation of means?<sup>773</sup>

510. It is generally recognized by writers that the notion of "due diligence" introduces a certain degree

<sup>768</sup> Sereni, *op. cit.*, p. 1517.

<sup>769</sup> Delbez, *op. cit.*, p. 367.

<sup>770</sup> Zannas, *op. cit.*, p. 131. Reuter uses the expression "responsibility for actions of negligence" (*op. cit.*, p. 182).

<sup>771</sup> See, for instance, Guggenheim, *Traité ... op. cit.*, p. 53, note 5.

<sup>772</sup> See, for example, M. Bourquin, "Crimes et délits contre la sûreté des Etats étrangers", *Recueil des cours ... 1927-1* (Paris, Hachette, 1928), vol. 16, pp. 237 *et seq.*; G. Berlia, "De la responsabilité internationale de l'Etat", *La technique et les principes du droit internationale - Etudes à l'honneur de Georges Scelle* (Paris, Librairie générale de droit et de jurisprudence, 1950), vol. II, p. 883; Zannas, *op. cit.*, pp. 71 *et seq.*; M. Sibert, *Traité de droit international public* (Paris, Dalloz, 1951), vol. I, p. 317; P. Louis-Lucas, "L'affaire de la légation de Roumanie à Berne", *Annuaire français de droit international*, 1955 (Paris), vol. 1, 1956, pp. 180 *et seq.*; Coussirat-Coustère and Eisemann, *loc. cit.*, pp. 346 *et seq.*; Luzzatto, *loc. cit.*, p. 81. Some writers, such as Zannas, refer to the "degree of the standard of diligence". Others, such as Reuter, mention the "degree of vigilance". Luzzatto underlines "the relative nature of the obligation of diligence".

<sup>773</sup> Coussirat-Coustère and Eisemann, *loc. cit.*, p. 371.

of flexibility in the operation of a system of international responsibility based upon the postulates akin to the "objective theory",<sup>774</sup> susceptible of taking account, eventually, of circumstances such as *force majeure* or "fortuitous event".<sup>775</sup> Thus, for instance, a supporter of the "subjective fault theory", Perrin, says:

Not being able to accept the theory of causal responsibility in all its rigour, its proponents temper its effects through the notion of negligence. Thus they avoid the difficulty that would be raised by *force majeure* or fortuitous event ...

Nevertheless, it is only fair to recognize that the rigour of causal responsibility would be softened in many cases by the uncertainty of the rules of international common law.<sup>776</sup>

and Ago:

The supporters of the objective theory have never denied, moreover, that the observance of a certain degree of diligence marks the limit beyond which one cannot affirm the existence of an international offence; they have merely sought to preserve their premises by skirting the obstacle, and by affirming thus that the limit constituted by this degree of diligence does not relate to the breach but to the actual object of the international obligation, so that, in the specific case, wrongfulness would be precluded not by the absence of the subjective element of fault, but by the absence of the objective element of the breach of a legal obligation.<sup>777</sup>

For the "fault theory", however, "absence of due diligence" is generally viewed as a negligence "culpable", namely as a "subjective fault" of the organ of the State.

Carlebach develops that position as follows:

It is impossible to understand how the notion of "due diligence" could be connected with that of fault. This notion, which made its way into international law through the "Washington rules" and which was stated specifically in article 8 of the XIIIth Convention of The Hague on the law of war, represents quite simply a definition, or, to be more precise, a limitation of the duty or prevention of States in respect of offences in international law committed by private persons. The State has fulfilled its duty - that is the sense of "due diligence" - when it has used the means available to it to prevent an offence under international law; if the offence is committed nevertheless, the State incurs no responsibility. It is a question, therefore, of the precise definition and delimitation of the obligation in international law to take certain measures; nowhere is it said that these measures must be positive acts; an abstention may also be an act of State. The problem of fault, however, has nothing to do with a standard that defines an obligation, for the question only arises in fact if there is a breach of the obligation; then is it necessary for the breach to have been made in a culpable fashion in order to provoke the sanction? But in the offence, the violation of "due diligence" would only be the external situation of fact, without anything having been expressed as to the necessity of the presence of the psychological factors of culpability.<sup>778</sup>

<sup>774</sup> See, for example G. Tenékidès, "Responsabilité internationale", *Répertoire de droit international* (Paris, Dalloz, 1969), vol. II, p. 783; Ruzié, *op. cit.*, p. 67.

<sup>775</sup> Reuter, *op. cit.*, p. 183: "The specific object of each duty of vigilance and all the factual circumstances must be taken into account".

<sup>776</sup> Perrin, *loc. cit.*, p. 427.

<sup>777</sup> Ago, "Le délit international", *loc. cit.*, p. 492.

<sup>778</sup> Carlebach, *op. cit.*, pp. 117-118.

511. As already indicated,<sup>779</sup> the fourth and last clarification relates to the *role played by the "element of fault" in a system of international responsibility based upon the concept of "internationally wrongful act"*. Today, the question of "fault" is no longer presented, generally speaking, in terms of responsibility based upon "subjective fault" as opposed to "objective responsibility" based upon an "internationally wrongful act". The concept of "internationally wrongful act", with both its elements (subjective and objective), has been generally accepted as the point of departure for the rules of international law governing State responsibility for international wrongs both by those favouring the subjective fault theory and by those supporting the "objective theory".<sup>780</sup> The matter is frequently approached now from another standpoint, namely *whether and to what extent the "element of fault" should be taken into account* in the various areas into which the rules governing State responsibility are usually divided, including of course in the definition of the "internationally wrongful act" but also in other contexts such as those dealing with circumstances precluding wrongfulness (especially "*force majeure*" and "fortuitous event") and attenuating and aggravating circumstances.<sup>781</sup> Regarding the consequences of an "internationally wrongful act" (compensation, satisfaction, sanctions), the relevance of the "fault" element is recognized by many writers, including supporters of the "objective theory".<sup>782</sup> The role played by "subjective elements" in the contemporary system of State responsibility for "internationally wrongful acts" has been referred to, in 1973, by Reuter, as follows:

<sup>779</sup> See para. 495 above.

<sup>780</sup> Even writers who still analyse responsibility based upon "fault" separately from responsibility based upon the concept of the "internationally wrongful act" stress the relationship between the latter and the former. See, for example, Cavaré, *op. cit.*, pp. 473-474.

<sup>781</sup> See, for example W. van Hille, "Etude sur la responsabilité internationale de l'Etat", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. X (1929) pp. 549 *et seq.*; G. Salvio, "La responsabilité des Etats et la fixation des dommages et intérêts par les tribunaux internationaux", *Recueil des cours ... 1929-III* (Paris, Hachette, 1930), vol. 28, pp. 269-270; L. Pons, *La responsabilité internationale de l'Etat à raison de dommages causés sur son territoire aux étrangers* (Toulouse, Boisseau, 1936), pp. 137 *et seq.* (thesis); Zannas, *op. cit.*, pp. 121 *et seq.*; J. J. A. Salmon, "Des 'mains propres' comme condition de recevabilité des réclamations internationales", *Annuaire français de droit international*, 1964 (Paris), vol. X (1965), pp. 225 *et seq.*; Favre, *loc. cit.*, pp. 569-570; L. Dubouis, "L'erreur en droit international public", *Annuaire français de droit international*, 1963 (Paris), vol. IX (1964) pp. 215-216; J.-P. Quéneudec, *La responsabilité internationale de l'Etat pour les fautes personnelles de ses agents* (Paris, Librairie générale de droit et de jurisprudence, 1966), pp. 163-164.

<sup>782</sup> "International Courts and Foreign Offices do not profess to make any fundamental distinction between wrongful, though perhaps innocent and unintentional, invasion of an alien's rights, and 'fault'-the degree of wilfulness or negligence in the commission of the injury affecting mainly the measure of damages" (Borchard, *loc. cit.*, pp. 224-225). "The measure of ... responsibility is, of course, a quite different matter from the imputation of liability" (Starke, "Imputability in international delinquencies", *loc. cit.*,

Case law has been led to introduce up to a certain point subjective elements into the mechanisms of responsibility.

Thus, case law cannot, in certain cases, disregard the intentions which impelled a wrongful act. In point of fact, an obligation of conduct always prohibits an act committed with wrongful intent, that is to say an act of malevolent or malicious intent. However, case law is more willing to take into consideration these investigations as to intent when it is a matter of concluding that the intent did not exist than in the contrary case (case of Pugh, Great Britain-Panama, *RSA*, vol. III, p. 1439, and cases relating to frontier incidents: incidents at Naulilaa or Wal-Wal, *RSA*, vol. II, p. 1025; vol. III, p. 1657). When there is malicious intent, the arbitrators say deliberately that they have been satisfied to register its external aspects; moreover, it is very rare for the text of a convention to include malicious intent among the elements constituting wrongfulness (article 20, Statute of Geneva of 9 December 1923). Intent is also taken into account when the wrongful act is deliberately directed against a person but affects him only by striking first a primary victim; in this case, contrary to the general rule, the person indirectly injured may claim reparation.<sup>783</sup>

### (b) Theoretical justifications of "*force majeure*" and "fortuitous event" as legal exceptions

512. International law writers who, in one form or another, take into account the "subjective fault" of the organ of the State justify the preclusion of wrongfulness by *force majeure* and fortuitous event on the basis that these circumstances are of such a nature as to impose themselves in a manner so absolute and inexorable upon the organ, that the possibility of any kind of malicious intent or culpable negligence on its part is excluded.<sup>784</sup> Vitta, for example, points out that:

p. 114, foot-note 1); "It is at present almost unanimously agreed that fault is not a necessary element in the responsibility of States and that the mere breach by a State of its international obligations is sufficient to render it responsible. We shall see, however, that the concept may influence to some extent the calculation of reparations" (J. Personnaz, *La réparation du préjudice en droit international public* (Paris, Sirey, 1939), p. 55); "The presence of this psychological element (*culpa lata*) is irrelevant as far as the existence of the wrongful act is concerned, but it does affect the legal relationship which arises in establishing proof of the wrongful act; it may affect the kind of reparations due (formal apology or other forms of satisfaction); and may, in addition, legitimize the imposition of sanctions which otherwise would be unwarranted. Thus, for example, *reprisal*, a type of sanction which presupposes a preceding wrongful act to compensate the State which accomplishes it, is not justified indiscriminately, but only in response to a particularly odious wrongful act or an explicit or implicit refusal to make reparation." (Sereni, *op. cit.*, p. 1522.)

<sup>783</sup> Reuter, *op. cit.*, p. 180. The paragraph quoted, entitled "Introduction of subjective factors", is inserted in a part of a section which begins with the following words:

"Can it really be said that any breach of an international obligation constitutes a 'wrongful act' involving the responsibility of the State, and that, vice versa, every 'wrongful act' derives from the breach of a legal obligation?"

"We must not hesitate to reply in the affirmative as far as the principle is concerned, but a number of particular aspects and problems must be raised ..." (*ibid.*, p. 179).

<sup>784</sup> "The law must, and in fact does, make allowances for ... cases so pressing and abnormal to which the ordinary rules of law

(Continued on next page.)

In cases where responsibility requires fault on the part of the State as the active subject of the illicit act, this necessarily implies fault on the part of its organs, i.e. a nexus of causality between the will of the latter and the commission of the illicit act, a nexus which exists both in the case where the organs desire the illicit act (*dolus*) and in the case of their inactivity or their neglecting to prevent the occurrence of the illicit act (fault in the proper sense).<sup>785</sup>

*Absence of subjective fault (lato sensu)* is the justification advanced by those writers to explain that conduct adopted under conditions of *force majeure*, or as a result of a fortuitous event, cannot be regarded as an act or omission susceptible of being attributed to the State as an international wrong.<sup>786</sup> The same applies, generally speaking, in the case of "omissions" for writers who consider that "subjective fault" in the form of "culpable negligence" is an essential condition of wrongful omissions. As Benjamin indicates, subjective fault or guilt embraces premeditation and every negligence, and is excluded by accident or any other unavoidable element.<sup>787</sup> To use the words of Oppenheim/Lauterpacht, the act or omission committed under *force majeure* or fortuitous event is not an act or omission committed "wilfully and maliciously nor with culpable negligence".<sup>788</sup>

513. Theoretical justifications of "*force majeure*" and "fortuitous event" based on the absence of subjective fault of the organ underline the relationship between these circumstances and the subjective element of the "internationally wrongful act", namely

(Foot-note 784 continued.)

cannot, in justice, be made to apply" (H. Arias, "The non-liability of States for damages suffered by foreigners in the course of a riot, an insurrection or a civil war", *American Journal of International Law* (New York), vol. 7, No. 4 (October 1913), p. 734.

<sup>785</sup> E. Vitta, "Responsabilidad de los Estados", *Revista española de derecho internacional* (Madrid), vol. XII, Nos. 1-2 (1959) p. 26. The writer adds:

"... in the case of an illicit act which cannot be attributed to the action or omission of one or more specific officials but is attributable to the action or omission of the State apparatus as such, it is clearly very difficult to investigate the psychological impulse which gave rise to the action or omission. In this case, it is not a question of investigating the conduct of an individual (the organ) answerable to the State but of determining the concerted conduct of the totality of organs and agencies constituting the State, which does not, however, rule out the possibility of undertaking such an investigation ..." (*ibid.*, p. 27).

<sup>786</sup> Even some writers who support the main postulates of the "objective theory" underline that "it is evident ... that the act of the organ ... is the equivalent of an act of the State and that the psychological situation of the organ should be regarded as the psychological situation of the State" (Quadri, *loc. cit.*, p. 460).

<sup>787</sup> F. Benjamin, *Haftung des Staates aus dem Verschulden seiner Organe nach Völkerrecht* (Breslau, Fleischmann, 1909), pp. 21-22 (thesis).

<sup>788</sup> Oppenheim, *op. cit.*, p. 343. For an analysis of the meaning of the words "wilfully and maliciously" and "culpable negligence" used by Oppenheim/Lauterpacht, see Perret, *op. cit.*, pp. 87 *et seq.* Perret concludes that, by using those words, Lauterpacht "indubitably bases the international responsibility of the State on the notion of fault", but he adds: "we believe that the fault [in question] possesses a clearly penal nature and is closer to the idea of *dolus* than to that of *culpa*" (*ibid.*, p. 90).

*attribution or imputation.* An "internationally wrongful act" cannot be established because "*force majeure*" or "fortuitous event" would prevent that act from being attributed to the State.<sup>789</sup> Pradier-Fodéré, for example, says that "we may not regard as giving rise to responsibility acts which ... are not imputable to their author, because they are the result of a fortuitous event or of *force majeure* ..." <sup>790</sup> Another express recognition of such a relationship may be found in the following passage by L'Huillier: "*Force majeure*" is a cause of exoneration from all responsibility ... it precludes ... the imputing [of the act] to the State, that is to say one of the conditions giving rise to the obligation of responsibility".<sup>791</sup> The point is particularly stressed in the following statement by Ago:

In fact, it seems clear that the concept of fault cannot but be the same in every branch of law, and that the problem of fault, in both international law and internal law, can only be a problem relating to the subjective element of the wrong, that is to say, the problem of voluntariness as a prerequisite for the attribution of the injurious act to its author. Furthermore, I trust that on this point I can count on the support of the most authoritative doctrine of internal law and, with its agreement, define fault (*culpa*), understood in its broad sense, precisely as a psychological relationship between the actual infringement of the subjective right of another, and the author of such an infringement. This psychological relationship may consist either in the fact that the infringement was directly wilful—in which case the real legal concept of criminal intent (*dolus*) applies—or in the fact that, while it was not at all directly wilful, it was nevertheless wilful, because of a failure to foresee the consequences of the conduct at variance with that which could have avoided such an infringement—in which case the concept of fault (*culpa*) in its strict sense, or that of negligence, applies. The various degrees of fault, on which there is no need to dwell here, are precisely the reflection of the various degrees of predictability of the event; while the negative limit of fault is provided either by the fact that the conduct in question was not voluntary or by the fact that the result of the injurious act was not absolutely foreseeable—in other words, to use common terms, that it was the result of *force majeure* or a fortuitous event.<sup>792</sup>

514. Some of the above-mentioned writers stress that *absence of subjective fault* is a justification susceptible of being applied not only to "omissions" but to "acts" as well, as Ago, for example, explains in the following paragraph:

If, in fact, in dealing with the question of fault, writers favouring this concept refer more frequently to cases of State responsibility for the acts of individuals, this is due solely to the fact that

<sup>789</sup> "... it hardly seems possible to dispute the fact that, in the international legal order, the generally accepted principle is that an activity is attributed to the State in subjective terms and only acts originating with a person who possesses the status of an organ, or is actually acting in that capacity and exercising its functions, can be considered acts of the State. As a result, we must surely reject the idea that only certain acts are invariably attributable to the State, regardless of the process, psychological or otherwise, which led up to them." (Luzzatto, *loc. cit.*, p. 57.)

<sup>790</sup> P. Pradier-Fodéré, *Traité de droit international public européen et américain* (Paris, Durand et Pedone-Lauriel, 1885), vol. 1, p. 351.

<sup>791</sup> J. L'Huillier, *Eléments de droit international public* (Paris, Rousseau, 1950), p. 368.

<sup>792</sup> Ago, "La colpa ...", *loc. cit.*, p. 190.

in the other cases, in which it is a question of breaches of more specific obligations, and generally speaking of positive acts or actions, it is much more difficult for wholly involuntary breaches to occur. This does not prevent examples of this type from being encountered, even quite frequently, particularly in the field of the international law of war. For example, because of fog preventing the distinctive signs posted from being seen, and despite all possible precautions having been taken, gunfire or an aerial bomb may fall on a hospital, a church or the embassy of a neutral country; after the conclusion of an armistice or a cease-fire, a battery lost in the mountains, which it has not been possible to inform in time because of a break in communications, may continue to fire on enemy positions; a Customs officer may search the baggage of a diplomat, in complete ignorance, through no fault of his own, of the latter's status; as Strisower has suggested, a State may have undertaken to hand over to another State a certain object, which is then destroyed without any negligence being imputable to any organ; or lightning may strike a lighthouse that a State has undertaken to keep lighted: these are a whole series of possible hypotheses in which the conduct or the result required by an international obligation has not been realized, without there having been any malicious intent or any fault on the part of the organs which should have engaged in the conduct or provided the result required. That in all these hypotheses there is no internationally wrongful act, and that no international responsibility can arise, is a conclusion that would appear to respond without any doubt to the conviction held by States. Practice appears to be unanimous on this subject ...<sup>793</sup>

515. For most of the supporters of the objective theory as a foundation of international responsibility, as well as for many of those who identify "fault" with the "breach of the obligation", the theoretical justification of *force majeure* and fortuitous event rests on the *objective element* of the "internationally wrongful act". The following passage by Anzilotti provides an indication of how the "objective theory" approaches the matter:

To establish whether a given mode of conduct is or is not contrary to the international duties of the State means to weigh the circumstances on the basis of the rule and, more specifically, to compare the attitude observed with the attitude required by the rule. The establishment of the attitude involved is a question of fact; the question of law resides therefore in the interpretation of the rule establishing the obligation which is claimed to have been violated.

Even international duties may be categorical; more often, they are hypothetical, that is to say conditional upon determined hypothetical circumstances; or even subordinate to the will to obtain a certain legal effect. A given act may therefore always and of itself constitute an internationally wrongful act ... or it may constitute a wrongful act only if the particular hypothetical circumstances envisaged by the rule exist; ... or, lastly, it may not constitute a wrongful act, but simply be the cause whereby certain legal consequences fail to be produced ...

It is, moreover, necessary to observe that the activity of the State envisaged by the international rules can be regulated by them in such a way that this activity, in its development and in the content of the acts in which it takes shape, is the fulfilment of a specific legal obligation; on the other hand, it may be regulated in such a way that it is free to develop at the moment deemed most appropriate, or to take one content or another according to a judgment of which other States may not demand any account; it is evident that the term "wrongful" may not be applied here, as long as the activity is kept within limits that are completely discretionary.

<sup>793</sup> Id., "Le délit international", *loc. cit.*, pp. 493-494.

Apart from these general considerations, it would seem neither profitable nor feasible to try to determine what is the act contrary to international law; it is a problem that is resolved, as we have said already, into a question of the interpretation of each rule: one cannot say in general what acts are contrary to international law; one can only say whether a given act is contrary to a given rule. Let us add that it is precisely here that the thorniest problems arise; certain comments made above regarding the imputation of individual acts and other comments that we shall make shortly in connexion with the problem of fault show that the most serious among the disputes to which the international responsibility of States gives rise relate to the precise determination of the nature and content of certain duties.<sup>794</sup>

516. Another example may be found in the following statement by Freeman:

Of all these criteria, none proves more complex than the first [an act or omission in violation of international law]. Damage and State misconduct are, of course, immaterial in the absence of internationally illegal action. This in turn always depends upon the substance of the obligation alleged to have been infringed; that is to say, the establishment of responsibility inevitably demands a prior knowledge of the State's international obligations. And the determination of that substance is frequently a most delicate matter. We need not at the moment dwell any further on this point, ... It ought, however, to be noted that in the ordinary case of responsibility in general the dispute will not be one as to the validity of a given principle, but will be found to turn rather on whether the principle is brought into play by the particular act complained of.<sup>795</sup>

517. As a logical consequence of that reasoning, the actual content of the obligation concerned becomes the point of reference for establishing the existence of an exception of *force majeure* or fortuitous event. Broadly speaking, and subject to what is indicated in the following paragraphs, for writers sharing the objective theory, an act or omission committed under *force majeure*, or as a result of a fortuitous event, would not give rise to an "internationally wrongful act" susceptible of being attributed to the State because, in the light of the express or implied content of the obligation concerned, the material conduct in question would not constitute "a breach of that obligation". It is, therefore, the *absence of a breach of the obligation*, and not the absence of subjective fault of the organ,<sup>796</sup> which is the justification given by such

<sup>794</sup> Anzilotti, *Cours de droit international (op. cit.)*, pp. 494-496. Commenting on the non-responsibility of the State for certain injuries sustained by foreigners in its territory, Anzilotti says:

"The grounds for the international responsibility of the State is not the unjust damage caused to foreigners, but the violation of international law, of which the injury suffered by individuals is a consequence. The events of which we speak are produced independently of or despite the fulfilment of the international duty of the State, through the inevitable hazards of social life, which exposes every individual to the danger of injury, despite the laws and the efforts of the authorities. Our case, on the contrary, presupposes the non-fulfilment of the international duty; it affirms the responsibility of the State, whatever the cause, when that cause lies in its organization or legislation. ("La responsabilité internationale ...") (*loc. cit.*), p. 28.)

<sup>795</sup> A. V. Freeman, *The International Responsibility of States for Denial of Justice* (London, Longmans, Green, 1938), p. 22.

<sup>796</sup> Thus, for example, T. Meron states:

"The cases considered seem to suggest that not only is an element of malice not essential to the establishment of responsibility,

(Continued on next page.)

writers to explain the preclusion of "wrongfulness" by *force majeure* or fortuitous event. The same would apply to "omissions", for those writers who, without sharing in the general postulates of the "objective theory", consider, however, that in such cases "subjective fault" cannot be dissociated from the "breach of the obligation".

518. While refraining from endorsing "subjective fault"—in the sense of malicious intent or culpable negligence—as a general condition of the "internationally wrongful act", some writers stress nevertheless that the act concerned should be a "wilful act". Sibert, for example, states that one of the conditions for establishing international responsibility is "that the injurious act is imputable to its author, that it results from the latter's free will", thereby preventing the State "from being declared responsible in cases of *force majeure*";<sup>797</sup> and Quadri points out that "responsibility must reside in a decision to act contrary to what is represented as prohibited by law, as a legal obligation".<sup>798</sup> For Schwarzenberger, "in the case of acts which involve the breach of *ius strictum*, all that matters is that the illegal act is imputable to a subject of international law and is voluntary".<sup>799</sup> The point is particularly emphasized by Brownlie, who begins his consideration of "objective responsibility" with the following words: "Technically, objective responsibility rests on the doctrine of the voluntary act: provided that agency and causal connexion are established, there is a breach of duty by result alone".<sup>800</sup> Another supporter of the "objective" theory who refers expressly to the "will of the State agent" is Jiménez de Aréchaga.<sup>801</sup>

519. A similar position has been adopted by some writers who conceive "fault" as being an "objective"

(Foot-note 796 continued.)

but even a total absence of fault will not be fatal to the claim" (Meron, *loc. cit.*, p. 96).

<sup>797</sup> Sibert, *op. cit.*, p. 311.

<sup>798</sup> Quadri, *loc. cit.*, p. 462.

"If the rule of conduct demands that the State should adopt certain precautions in order that the damage may be avoided, in this case the violation of the rule will bear the character of a fault; if the rule of conduct, on the other hand, is limited to demanding some behaviour (positive or negative) not conforming to the notion of 'diligence', in this case it suffices for the act to be voluntary, and an act of the State will have no need to be subsequently qualified." (*Ibid.*, p. 460.)

<sup>799</sup> G. Schwarzenberger, "The fundamental principles of international law", *Recueil de cours ... 1955-I* (Leyden, Sijthoff, 1956), vol. 87, p. 351. The writer adds:

"Again, however, this statement is subject to the qualification that international judicial institutions tend to transform absolute rights into relative rights. Even in the case of *jus aequum*, at the most, a presumption exists in favour of the standard of culpability. For instance, the rule on the minimum standards which must be observed in relation to foreigners itself contains an objective, although very lenient, standard which, irrespective of subjective guilt, must be upheld by any subject of international law. Conversely, a rule of international law may reduce explicitly the standard of liability below that of normal culpability ..." (*ibid.*).

<sup>800</sup> Brownlie, *op. cit.*, p. 423.

<sup>801</sup> Jiménez de Aréchaga, *loc. cit.*, p. 544.

concept synonymous with failure to observe one's legal obligation or duty. According to Cheng, for example:

... an unlawful act must be one emanating from the free will of the wrongdoer. There is no unlawful act if the event takes place independently of his will and in a manner uncontrollable by him, in short, if it results from *vis major*; for the obligation, the violation of which constitutes an unlawful act, ceases when its observance becomes impossible.

... culpable negligence constitutes only one category of fault, namely, default in those obligations which prescribe the observance of a given degree of diligence for the protection of another person from injury. Fault as such, however, covers a much wider field. It embraces any breach of an obligation. There are certain obligations which merely stipulate that a party should do or abstain from doing certain acts. This is so as regards most treaty obligations, as well as most contractual obligations in the municipal sphere. The mere failure to comply with such obligations, unless it is the result of *vis major*, constitutes a failure to perform an obligation, and a fault entailing responsibility. In such instances, there is no need to consider whether the failure is accompanied by malice or is due to negligence.<sup>802</sup>

520. "Wilfulness" is, of course, implied in the "subjective fault" doctrine. But the writers mentioned in the two preceding paragraphs regard "wilfulness" of the organ as something different and detachable from any psychological state of mind such as the malicious intent or culpable negligence of the "subjective theory". Therefore, for those writers the main justification of the preclusion of wrongfulness by *force majeure* or fortuitous event is not the absence of subjective fault but the *lack of wilfulness*. In putting forward this justification, they rely on the subjective, as well as on the objective element of the internationally wrongful act and establish, in a certain sense, a bridge between the justification of the absence of subjective fault and the justification of the absence of a breach of the international obligation. As Jiménez de Aréchaga points out, "an external cause" independent "of the will of the State agent" such as *force majeure* "cannot be categorized as an act or omission in breach of an international duty, and imputable to the State".<sup>803</sup> Reliance on the subjective element is still more noticeable among those who, such as B. Cheng, establish a link between freedom of action and their "objective" concept of "fault".

521. Some of the writers who refer to the lack of wilfulness of the organ make a distinction in this respect between "acts" and "omissions", referring sometimes, in the latter case, to *lack of knowledge*. An example of this tendency may be found in the following passages by Schwarzenberger "... in the case of unlawful omissions, actual or, at least, constructive knowledge on the part of the tortfeasor State is essential";<sup>804</sup> "... in cases of alleged omission to act as required by international law, the existence of some subjective element such as knowledge

<sup>802</sup> Cheng, *op. cit.*, pp. 223 and 226.

<sup>803</sup> Jiménez de Aréchaga, *loc. cit.*, p. 544.

<sup>804</sup> Schwarzenberger, "The fundamental principles ..." (*loc. cit.*), p. 352.



appears indispensable.”<sup>805</sup> Doctrinal developments on the concept of “knowledge” or “lack of knowledge” appeared after the Second World War, on the occasion of the judgment of the International Court of Justice in the *Corfu Channel* case (Merits), particularly in connexion with the passage of the judgment in which the Court concludes “that the laying of the minefield which caused the explosions could not have been accomplished without the knowledge of the Albanian Government”.<sup>806</sup>

522. Certain writers have interpreted that passage as an application by the Court of the theory of “subjective fault”. Thus, for example, Hostie says:

The Court found that there actually were such inferences to be drawn in this case. Albania was accordingly held liable, being responsible of guilty knowledge and inaction when there was sufficient time and opportunity for warning the British war vessels of their peril.<sup>807</sup>

For others, such as Jiménez de Aréchaga,

...the court did not attempt to determine whether international responsibility originated in ‘fault’ or in ‘risk’ ... [it] sought to determine responsibility by attempting to see whether there had been a violation of a pre-existing obligation, ... the knowledge postulated by the Court was necessary to determine that a pre-existing obligation had been violated, since only a State which knows that a minefield has been located in its territorial waters would be obliged to notify other States of its existence ... the Court, following the same line as arbitral tribunals, examined the means at the disposal of the Albanian authorities to comply with such [an] obligation. It found that it was feasible for the Albanian authorities to have warned the vessels. Albania was thus held responsible for the objective violation of an international duty, and an inquiry into the subjective position of any individual organ or agent of the Albanian Government was not necessary.<sup>808</sup>

A distinction between the “knowledge” referred to by the Court and the concept of “subjective fault” appears likewise in the following passage by Chung:

The juridical construction of the judgement is in perfect agreement with these lines. The Court, first of all, laid down what was the obligation incumbent upon the Albanian authorities. It then found that the defendant State made no attempt to fulfil this obligation. It thus held that “these grave omissions involve the international responsibility of Albania”. The important thing is, to recapitulate, that the Court was concerned with unlawful omissions. Unlawful omissions require a duty to act. This duty requires *knowledge* of the circumstances in which this duty arises. In other words, knowledge of the minelaying *as such* imposed on the Albanian authorities the duty to act. Knowledge was the test of imputability of unlawful omissions. After rejecting the theory of absolute responsibility, the Court “insisted on and satisfied itself with this knowledge”—this subjective requirement—which is, none the less, not identical with *dolus* or *culpa* in the sense of the so-called *culpa*-doctrine.<sup>809</sup>

523. *Lack of control* and *lack of means to act* are also mentioned, in some contexts, as justifications of

<sup>805</sup> *Id.*, *International Law* (*op. cit.*), p. 650.

<sup>806</sup> See para. 303 above.

<sup>807</sup> Hostie, *loc. cit.*, p. 93.

<sup>808</sup> Jiménez de Aréchaga, *loc. cit.*, p. 537.

<sup>809</sup> I. Y. Chung, *Legal Problems Involved in the Corfu Channel Incident* (Geneva, Droz, 1959), p. 168 (thesis). The writer concludes that the judgement based State responsibility on an objective breach of international obligations. In this connexion, D. Lévy observes that:

an exception of *force majeure*. International obligations of conduct of the State providing for a certain level of vigilance (or “due diligence”), in connexion with activities of other States or private individuals, relating to neighbourly relations, conduct of neutrals during an international armed conflict, protection of aliens, etc., is the area within which those kinds of justification are more often advanced. The “three rules” of the Treaty of Washington and the judgement of the Arbitral Tribunal concerning the *Alabama* case<sup>810</sup> and article 8 of the The Hague Convention (XIII) of 1907<sup>811</sup> provide the classical examples examined in this respect by international doctrine. Referring to the matter in general terms, Van Hille, for example, states:

Let us also note that the decisions of tribunals have made it accepted that the State could no longer be regarded as responsible in cases where it had employed all normally required means to avoid the injury.<sup>812</sup>

Others refer to the actual capacity to act.<sup>813</sup>

524. Ultimately, the justifications of “lack of control” or “lack of means” are very much linked to the commonly shared opinion that international obligations are not without limitations and that “the absolute control that the State possesses over its own territory cannot impose on it obligations that cannot in practice be fulfilled. *Ad impossibile nemo tenetur.*”<sup>814</sup> Even the duty of exerting “due diligence” is not regarded, generally, as going beyond the material or legal means at the disposal of the State.<sup>815</sup> The statements below illustrate the point:

De Visscher:

Observation shows that the entry into the picture of responsibility and its establishment depend to a large extent on the organization of the power and effectiveness of the control exercised over its territory by the State in question. This element of domestic political order may enter into account either to mitigate or to preclude responsibility, or on the other hand to extend and amplify it.

The control exercised by the State over the whole extent of its territory is the basis for the international responsibility that it may assume on the ground of acts contrary to international law committed therein. The extent of this responsibility, therefore, may vary according to the degree to which this control is effective.<sup>816</sup>

“One may conclude from this that the Court remains faithful to the theory of responsibility for failure in an obligation—the obligation to warn. It still holds that, for responsibility, it is necessary that there should have been knowledge. Consequently, it does not accept absolute responsibility or responsibility based on risk. But to the extent that it does not demand that formal proof of knowledge be offered, it is considerably extending responsibility for omission in comparison with traditional case law” (Lévy, *loc. cit.*, p. 757).

<sup>810</sup> See paras. 334 and 335 above.

<sup>811</sup> See para. 101 above. See, for example, M. R. García-Mora, *International Responsibility for Hostile Acts of Private Persons against Foreign States* (The Hague, Nijhoff, 1962), pp. 62–63.

<sup>812</sup> Van Hille, *loc. cit.*, p. 569.

<sup>813</sup> See, for example, Cheng, *op. cit.*, p. 222.

<sup>814</sup> Zannas, *op. cit.*, p. 54.

<sup>815</sup> Jiménez de Aréchaga, *loc. cit.*, p. 536.

<sup>816</sup> C. de Visscher, *Théories et réalités en droit international public*, 4th ed. (Paris, Pedone, 1970), p. 307.

## Schwarzenberger:

A Government is responsible for the illegal acts and omissions of its own organs, and only for such. It is not responsible for the activities of revolutionaries. Nevertheless, the existence of a revolution may become a relevant fact in determining and limiting the international responsibility of a State involved in an internal armed conflict ... As a general rule, a State may plead this occurrence [an internal armed conflict] as a case of *force majeure* ...

If international torts are attributable to successful revolutionaries, they may yet be able to plead a diminished responsibility or non-responsibility, because of the character of their internal armed conflict as *force majeure*.<sup>817</sup>

## Chaumont:

The expansion of the concept of due diligence has made it possible both to hold a State responsible for the acts of insurgents that possible foresight or supervision on its part might have sufficed to prevent, and to free it of responsibility for acts that it had no means of controlling.<sup>818</sup>

## Elynytchev:

The objective character of State responsibility is derived primarily from the principle of State sovereignty. Territorial supremacy and political independence, as the two component parts of sovereignty (which should be considered a decisive criterion of statehood), determine the nature of responsibility in contemporary international law. By establishing and maintaining a certain law and order in its territory, the State establishes its rule within that territory, to the exclusion of the authority of any foreign State. At the same time, the State is obliged in its territory to ensure the fulfilment of its international obligations (mainly derived from the basic principles of international law).<sup>819</sup>

525. Conflicting views are frequent, however, in international doctrine as to the actual content of certain obligations embodying the standard of "due diligence" and by way of consequence as to the scope of the application of an exception of "*force majeure*" with regard to those obligations. García-Mora, for example, considers that under international law the inability of a State to fulfil its duty of preventing hostile acts of individuals within its jurisdiction against another State confronts the State concerned with the alternative either to resort to a world or a regional authority capable of repressing these acts or to suffer enforcement action as an aggressor. The writer continues:

The basic postulate underlying this third level of obligation is simple enough, namely, that inability to act similarly engages the peace and security of mankind and should not therefore be accompanied by inactivity or indifference on the part of the State [in invoking] organized community action. It is therefore submitted that, even in terms of the traditional law, if a State has obviously used all the means at its disposal to prevent a hostile act of a person against a foreign nation but is physically unable to suppress it, it certainly has not discharged its international duty. This view of the matter sharply draws attention to the possibility that a State thus acting is guilty of an act of aggression.<sup>820</sup>

Such a view does not seem to be shared, however, by

<sup>817</sup> Schwarzenberger, *International Law, op. cit.*, 1968, vol. II, pp. 677, 683 and 697.

<sup>818</sup> C. Chaumont, "Cours général de droit international public", *Recueil des cours ... 1970-I* (Leyden, Sijthoff, 1971), vol. 129, p. 494.

<sup>819</sup> V. Elynytchev, *loc. cit.*, p. 126.

<sup>820</sup> García-Mora, *op. cit.*, p. 30.

other writers. Kunz, referring to the obligation of a neutral State, states:

A neutral State which has used all the means at its disposal to prevent a violation of its neutrality but is *unable* to prevent it, has fulfilled its international duty, is not guilty of any violation of international law: hence no sanctions, no military reprisals against this State are justified.<sup>821</sup>

In Kunz's view, the responsibility of the State is adequately discharged if it uses all the means at its disposal to prevent the harmful act, irrespective of the adequacy of the measures taken. The writer recognizes, however, that, when the means at the disposal of the State "are clearly inadequate" to fulfil its neutral obligations, a belligerent State is not forbidden from undertaking, as an extreme measure, hostile acts in territory under neutral jurisdiction against an enemy making improper use of that jurisdiction.<sup>822</sup>

526. There is an additional justification of *force majeure* and fortuitous event shared by international law writers endorsing the justification of "absence of subjective fault" (e.g., Le Fur,<sup>823</sup> Verdross,<sup>824</sup> etc.), as well as those endorsing the "absence of a breach of the obligation" (e.g., Basdevant,<sup>825</sup> Jiménez de Aréchaga, Maryan Green, Ruzie, etc.) or the "lack of wilfulness" or "knowledge" (e.g., Cheng, Sibert, Schwarzenberger,<sup>826</sup> etc.) justifications, namely that *force majeure (lato sensu)* is a *general principle of law* which excludes, in international law, international responsibility for the non-fulfilment of international obligations, as it does in the various municipal law systems. Sibert, for example, explains the entry of *force majeure* into the realm of international law as follows:

There is no further need to demonstrate the place occupied by *force majeure* in the *general principles of law*; it would have been wrong not to include it: "*ad impossibile nemo tenetur*" is a universal principle. Through the by-way of the general principles of law, *force majeure* has passed into international public law itself, not all at once, of course, and not universally, but in stages.<sup>827</sup>

In the same sense, Goebel writes:

The concept of *vis major* is a doctrine of municipal law which has been transferred to international jurisprudence to enable a State to escape liability where it otherwise would be responsible.<sup>828</sup>

<sup>821</sup> J. L. Kunz, "Sanctions in international law", *American Journal of International Law* (Washington, D.C.), vol. 54, No. 2 (April 1960), pp. 331-332.

<sup>822</sup> *Ibid.*, p. 332. Regarding the meaning of the expression "obligation to prevent" in the field of the rules concerning international peace and security, see, for example, Q. Wright, "The prevention of aggression", *ibid.*, vol. 50, No. 3 (July 1956), p. 527.

<sup>823</sup> L. Le Fur, "Règles générales du droit de la paix", *Recueil des cours ... 1935-IV* (Paris, Sirey, 1936), vol. 54, pp. 199-200.

<sup>824</sup> A. Verdross, "Les principes généraux du droit dans la jurisprudence internationale", *ibid.*, 1935-II, vol. 52, p. 215.

<sup>825</sup> J. Basdevant, "Règles générales du droit de la paix", *ibid.*, 1936-IV, 1937, vol. 58, pp. 555-556.

<sup>826</sup> Schwarzenberger, "The fundamental principles ...", *loc. cit.*, pp. 352-353.

<sup>827</sup> Sibert, *op. cit.*, p. 334.

<sup>828</sup> J. Goebel, Jr., "The international responsibility of States for injuries sustained by aliens on account of mob violence, insurrections and civil wars", *American Journal of International Law* (New York), vol. 8, No. 4 (October 1914), p. 813.

527. The reference to the “general principles of law” is particularly significant with respect to writers who initially justify “*force majeure*” on the basis of the absence of a breach of the obligation or on the basis of lack of wilfulness or knowledge. Anzilotti himself says:

It is true, however, that in most cases it is impossible to resolve the question [the content of the obligation] on the basis of a given rule; it is then necessary to have recourse to the general principles of law.<sup>829</sup> For Jiménez de Aréchaga: under general principles of law recognized in all countries, there is no responsibility if a damage ensues independently of the will of the State agent and as a result of *force majeure*.<sup>830</sup>

Other express references may be found in the following passages by Maryan Green:

It is a general principle of law that a State cannot incur responsibility for damage occurring independently of its will. To impute the damage to the State in such circumstances would be to replace the concept of responsibility by that of absolute liability.<sup>831</sup>

and by Cheng:

It follows from the above survey of international decisions that the principle of fault and its corollary, the concept of *vis major*, are general principles of law governing the notion of responsibility in the “very nature of law”. Their application in the international legal order, is abundantly confirmed by international judicial practice.<sup>832</sup>

528. There are also many writers, including followers of the “objective theory”, who list expressly “*force majeure*” among the *exceptions recognized by international law*. Personnaz, for example, states:

In certain hypotheses, special circumstances provide the State with a legal excuse releasing it from its international obligation. The most frequent cases are those of *force majeure*, self-defence and, to a certain extent, state of emergency. In these hypotheses, it is traditionally accepted that the right of self-preservation of the State permits it to perform acts contrary to its international obligations and to ordinary international law.<sup>833</sup>

Delbez writes:

The exceptions claimed before the Court may be circumstantial exceptions [he lists *force majeure*] or the result of a contractual situation (Calvo clause).<sup>834</sup> After stating that “the wrongfulness of the act must not be precluded by an exception recognized in inter-

national law”, Ruzié includes among these exceptions *force majeure*.<sup>835</sup>

529. Lastly, it should be noted that the so-called *principle of self-preservation*, as well as the theory of “state of emergency” (*état de nécessité*), and even *self-defence*, were sometimes referred to in connexion with *force majeure*. The present doctrinal general trend would seem to justify *force majeure* in itself, without reference to self-preservation or to justifications applicable to other circumstances susceptible of precluding wrongfulness such as state of emergency or self-defence.

530. All the theses referred to above (*absence of subjective fault; absence of a breach of the obligation; lack of wilfulness; lack of knowledge; lack of control; lack of means; general principle of law; exception recognized by international law*), provide a legal justification for the fact, ascertained from State practice and international judicial decisions, that *force majeure* and fortuitous event are susceptible of precluding wrongfulness under international law. Certainly, at the outset it would appear that the scope of the application of these exceptions varies according to the justification adopted. For example, the justification of “absence of subjective fault” would appear *prima facie* to provide a wider scope for the application of the exception than the justification of “absence of a breach of the obligation”. But even this seems to be a distinction more apparent than real. Actually, those who explain *force majeure* and fortuitous event as an “absence of subjective fault” do not exclude at all the possibility that a particular international obligation could provide that any non-compliance, even non-compliance resulting from *force majeure* or fortuitous event, should be considered as a wrongful act or omission.<sup>836</sup> Moreover, writers who rely on the absence of a breach of the obligation, or on the lack of wilfulness or knowledge recognize that a specific pre-existing international obligation could provide that the act or omission concerned must be accompanied by “subjective

<sup>835</sup> Ruzié, *op. cit.*, p. 67.

<sup>836</sup> See, for instance, J. F. Hostie:

“To sum up, international law as it stands does not substantiate views expressed by commentators in favour of objective liability. For certain categories of cases and in certain relationships only, liability expressly or implicitly based on that foundation might, however, be recognized on occasion by an international tribunal or Court, but it may safely be said today that such recognition would appear as a derogation from general international law which would find its justification in the adoption by parties to a treaty, an agreement or a compromise of a special rule to that effect.” (Hostie, *loc. cit.*, p. 93); and A. Ross:

“It is probably right to say that international law—through the acceptance of a generally recognized legal maxim—as a *main rule* makes the *culpa* rule the basis of responsibility, though it does not acquire the same practical importance as in civil law, partly because many of the norms of international law are formal norms of competence in which the question of guilt in most cases falls into the background; partly because in international relations due diligence must be strictly demanded, so that responsibility is often taken for granted without any special discussion of the question of culpability” (Ross, *op. cit.*, pp. 257–258).

<sup>829</sup> Anzilotti, *Cours ... (op. cit.)*, p. 499. Commenting on international obligations of conduct involving duties of diligence and vigilance, Guggenheim says:

“For certain categories of persons enjoying special protection, such as diplomatic agents or prisoners of war, there are special rules, independent of domestic law, as to the duties of diligence and vigilance incumbent on the host State. These rules are part either of international customary law or of international conventional law. Such autonomous rules of the law of nations derive also from the general principles of law of the civilized world” (Guggenheim, *Traité ... (op. cit.)*, pp. 54–55).

<sup>830</sup> Jiménez de Aréchaga, *loc. cit.*, p. 544.

<sup>831</sup> Maryan Green, *op. cit.*, p. 259.

<sup>832</sup> Cheng, *op. cit.*, p. 231. The writer stresses, however, the following point: “... whether or not malice or culpable negligence is necessary to constitute an unlawful act depends not upon a general principle covering all unlawful acts but upon the particular pre-existing obligation” (*ibid.*, p. 226).

<sup>833</sup> Personnaz, *op. cit.*, pp. 62 and 63.

<sup>834</sup> Delbez, *op. cit.*, p. 368.

fault" in order to be considered a wrongful act.<sup>837</sup> On the other hand, the general adoption of the concept of "internationally wrongful act" has simplified matters, because, as Carlebach points out:

If the carrying out of the act as a whole is not, in certain circumstances, a wrongful act, then all the elements of the delict also benefit from the privilege of the preclusion of wrongfulness.<sup>838</sup> Here again, the matter would seem to turn, ultimately, on the question of what the general principle should be and what the exception should be. The adoption as a general principle of one of these two doctrinal approaches may, however, be of great importance in other ancillary questions, and particularly with regard to the question whether the burden of proof should be on the plaintiff or on the defendant.<sup>839</sup>

**(c) Conditions required for the existence of a legal exception of *force majeure* or of fortuitous event**

531. The concept of *force majeure* and fortuitous event elaborated by international law writers does not differ in any essential element from the one which may be found in the various domestic law systems. To recognize the existence of *force majeure* and fortuitous event, such writers generally refer to the same conditions which characterize those circumstances in domestic law, namely that: (a) the event invoked as *force majeure* or fortuitous event must be absolutely independent of those who act; (b) the event invoked must be unforeseen or foreseen but inevitable or irresistible; (c) the event invoked must have rendered impossible the fulfilment of the obligation; and (d) the event invoked must be in direct causal nexus with the resulting effect of the impossibility of fulfilling the obligation.<sup>840</sup>

<sup>837</sup> For example: "On the other hand, particular rules of international law may require, as a condition of responsibility, an element of malice on the part of the state agent who violated the rule" (Jiménez de Aréchaga, *loc. cit.*, p. 536); "Nothing in fact prevents two States from stipulating by means of a convention that the wrongfulness of an act shall be dependent on the existence of fault" (Sereni, *op. cit.*, p. 1521); "Judicially tempered discretion in its inarticulate form or, if the *jus aequum* rule were consciously applied, reasonableness and equity, provide the only guidance on whether, in any particular case, an international court or tribunal ought to require more than evidence of an unjustified, uncondoned, imputable and voluntary breach of an international obligation" (Schwarzenberger, *International Law (op. cit.)*, vol. I, p. 652).

<sup>838</sup> Carlebach, *op. cit.*, p. 103.

<sup>839</sup> The question of the burden of proof is very much at the centre of the preoccupation of writers. A rational organization of a system of proofs has been advanced sometimes by writers as a practical alternative, in order to overcome theoretical difficulties arising out of existing divisions on the role to be attributed to "subjective fault" (see, for example, the proposal made in 1927 by C. de Visscher before the Institut de droit international (*Annuaire de l'Institut de droit international*, 1927 (Paris), vol. 3, p. 106). The Corfu Channel case has also attracted various doctrinal comments on the question of the admissibility of circumstantial evidence in connexion with certain types of international obligation (see *I.C.J. Report 1949*, p. 18).

<sup>840</sup> See para. 15 above.

The sample of statements quoted below confirms such a conclusion:

Fauchille:

It is necessary for the act to be imputable to its author, that is to say for it to be regarded as the result of the latter's free will ... But, of course, the fortuitous event or case of *force majeure* must not have been preceded by any fault without which it would not have produced results prejudicial to anyone.<sup>841</sup>

Podestá Costa:

The inexorable nature of the prejudicial agent is not an essential prerequisite for *force majeure*. In order for a case to be regarded as one of *force majeure*, it is necessary that the extraordinary event which makes it impossible to fulfil an obligation should be extraneous to the person who has to fulfil it and that the said person should, despite his proceeding with diligence, have been unable and be unable to avoid the event in question. The injuries arising in such circumstances are not ascribable to the person who has thus omitted to fulfil an obligation or has fulfilled it incompletely.

... the mere possibility of an event's taking place does not mean that it is probable and that the necessary precautions must therefore be taken to avoid it. ... Where it is a question of injury caused to third parties by culpable non-fulfilment of an obligation, foreseeableness consists in the ability of the person under the obligation to know in proper time about the act of force whose execution he should have prevented and which he should have averted, thus protecting the interests of others. Ability to foresee the injurious event implies the possibility of preventing it. If the event is not foreseeable or if it is foreseeable but cannot be averted, that is a case of a fortuitous event or *force majeure*.<sup>842</sup>

Sibert:

Thus does the effect of *force majeure* affirm itself, *an inevitable and irresistible event* ... the consequence of which is to deflect the normal course of juridical situations ... Thus, on contact with case law that, though rather meagre, is absolute, it appears that the element of inevitability is the dominant feature in the whole concept of *force majeure*. For *force majeure* to exist, it is necessary for there to have been *no means* of resisting or avoiding the events in question.<sup>843</sup>

L'Huillier:

[*Force majeure*] presupposes, in fact, that the prejudicial act, while it is correlative to the action of a State, is imputable to a cause external to that action, a cause that the organs of the State could neither have foreseen nor prevented.<sup>844</sup>

532. International law writers agree generally that the "impossibility" of performance resulting from *force majeure* or fortuitous event may be of a physical, as well as a legal character. Schwarzenberger remarks in this respect that "the voluntary character of any internationally relevant act is not identical

<sup>841</sup> Fauchille, *op. cit.*, p. 516.

<sup>842</sup> L. A. Podestá Costa, "La responsabilidad del Estado por daños irrogados a la persona o a los bienes de extranjeros en luchas civiles", *Revista de Derecho Internacional* (Havana), vol. XXXIV, No. 67 (30 September 1938), pp. 52-53.

<sup>843</sup> Sibert, *op. cit.*, pp. 334-335.

<sup>844</sup> L'Huillier, *op. cit.*, p. 368.

with physical voluntariness".<sup>845</sup> This general conclusion ought, however, to be qualified by the reservation made above concerning municipal law.<sup>846</sup> Commenting on this question, Fitzmaurice, for example, says:

... It may occur for instance that a State has duly signed and ratified a treaty which is in force, and its Government subsequently discovers that, owing to some provision of or deficiency in its municipal law, it cannot implement the treaty (suppose, for instance, it is a treaty granting certain commercial rights to the citizens of another country). The Government then asks the legislature to remedy the defect, but the legislature refuses or fails to do so. It may not be unnatural in those circumstances for the Government to plead a sort of *force majeure* or situation of *non possumus*; but this plea cannot be accepted. The fallacy lies in regarding the obligation as resting on the Government, whereas the Government is merely the agency for carrying it out. The obligation rests on the State as a whole, of which the Government is only a part. It is always immaterial which particular part of the State or State organ is responsible for the failure, for it is still the failure of the State as a whole.<sup>847</sup>

533. It must be noted that some international law writers also underline that the "impossibility" resulting from *force majeure* or fortuitous event is of a temporary nature. Rolin, for example, has written:

Only *force majeure* resulting from exceptional and temporary circumstances, such as civil war, would permit the State to escape the responsibility resulting from its failure to maintain public order and tranquillity.<sup>848</sup>

It is precisely on the basis of its temporary character that, as has been observed,<sup>849</sup> certain writers, such as Tenekides, distinguish between *force majeure* as such and the rule "*impossibilium nulla obligatio est*".

534. As Cavaré says,

In those hypotheses in which responsibility is founded upon the fault or wrongful act, it is necessary, in order for it to be recognized, for the injury to be the real result of the fault or the wrongful act of the State. There must be a genuine nexus between the injury and the fault of the State or the wrongful act imputable to it. This is the causal nexus demanded by domestic legislations and case law.<sup>850</sup>

A causal nexus must, likewise, exist between the event alleged as constituting *force majeure* or fortuitous event and the impossibility of performing the obligation in order to preclude "wrongfulness" and, consequently, international responsibility. Doctrine would seem also to admit that such a causal nexus does not need to be, in all cases, an immediate one. For example, it may happen that *force majeure* or fortuitous event may induce those acting for the

State into "error". In such a case, the whole of the circumstances surrounding the case may be viewed as *force majeure* or fortuitous event, although the immediate cause of the conduct adopted was an error.<sup>851</sup>

535. The conditions required to conclude that *force majeure* or fortuitous event exist, indicated above, provide at the same time guidance on the basis of which it becomes possible to distinguish those circumstances from others which may also preclude "wrongfulness", in particular from the one called "state of emergency" (*état de nécessité*). As several writers stress, *force majeure* and fortuitous event deprive those acting on behalf of the subject of the obligation of their "free will".<sup>852</sup> while, as de Visscher points out:

The excuse of emergency implies a certain freedom, in the sense that the claimant has seen fit, in the light of a choice that, while certainly limited, was none the less conscious and reasoned, to set his own interests above the rights of others; it involves a comparison of the respective values of the interests present.<sup>853</sup>

536. The conditions characterizing *force majeure* and fortuitous event also make it possible to differentiate those circumstances from other institutions recognized by international law such as "angary". Thus, for example, Ullóa, a writer who recognizes expressly *force majeure* as an exonerating circumstance, states that angary is an institution which authorizes the State to perform certain acts but does not exonerate it from the duty to make reparation, because "in reality the injuries inflicted on individuals in such cases are not of an unavoidable nature and would not therefore be equated with those brought about in the pursuance of violent acts of war".<sup>854</sup>

#### (d) Material causes of an exception of *force majeure* or of fortuitous event

537. Forces of nature are frequently referred to by international law writers as the typical example of

<sup>851</sup> On the question of "error" as "ground for exoneration from responsibility for the wrongful act", see Dubouis, *loc. cit.*, pp. 212 *et seq.*

<sup>852</sup> See, for instance, Cheng, *op. cit.*, p. 227.

<sup>853</sup> C. de Visscher, *Théories et réalités ... (op. cit.)*, 3rd ed. (1960), p. 339.

<sup>854</sup> A. Ullóa, *Derecho Internacional Público*, 4th ed., (Madrid, Ediciones Iberoamericanas, 1957), vol. II, pp. 262-263. As indicated by Bonfils:

"In the case of civil disorders or external war, in the interest of its own defence or in order to ensure greater secrecy for a maritime operation, a State may be led to detain in its ports for a time all commercial vessels, national or foreign. It is an *embargo* if it prevents them from leaving without assigning them a mission; it is *angary* in cases where it requisitions these merchant vessels for public service ...

"*Angary* is a special measure that involves financial responsibility on the part of the State that has recourse to it" (H. Bonfils, *Manuel de droit international public*, 7th ed. (Paris, Rousseau, 1914), p. 210).

<sup>845</sup> Schwarzenberger, "The fundamental principles ...", *loc. cit.*, p. 352. The writer adds: "The question, however, remains by what criteria it is to be determined whether a subject of international law has exhausted all legal possibilities in order to comply with its duties under international law" (*ibid.*).

<sup>846</sup> See para. 37 above.

<sup>847</sup> Sir Gerald Fitzmaurice, "The general principles of international law considered from the standpoint of the rule of law", *Recueil des cours ...*, 1957-II (Leyden, Sijthoff, 1958), vol. 92, p. 87.

<sup>848</sup> Rolin, *loc. cit.*, p. 447.

<sup>849</sup> See foot-note 25 above.

<sup>850</sup> Cavaré, *op. cit.*, p. 482.

causes giving rise to *force majeure* or fortuitous event. As Eagleton says, it would doubtless be admitted that a Government would not be expected to repair losses resulting "from earthquake, fire, flood, plague, and other forces of nature. *Ad impossibile nemo tenetur.*"<sup>855</sup> But *force majeure* and fortuitous event may result also from causes having a human origin. Human phenomena, like international war, civil war, insurrections, revolutions, riots, mob violence, etc., may also give rise to conditions of *force majeure* or fortuitous event. It is actually by studying the matter with reference to those kinds of disturbance that doctrine has clarified important aspects of the concept of *force majeure* as a circumstance precluding wrongfulness in the field of State responsibility for internationally wrongful acts.

538. Particularly rich in that respect is the debate engaged in by international law writers during the second part of the nineteenth century and the first part of the twentieth century on the question whether a State may be held to account for injuries sustained by aliens in its territory in the course of civil wars, insurrections, revolutions, riots, mob violence, etc. There is one aspect of the debate which does not require review in a paper devoted to *force majeure*, namely, the question of the definition and scope of the international obligations concerning the treatment of aliens and of the principles on which these "primary rules" are largely based (equality of treatment with nationals, or compliance with standards internationally established).<sup>856</sup> Also without major interest for this survey are the views developed during the debate on matters relating to "secondary rules" (rules governing State responsibility) other than *force majeure* as a circumstance precluding wrongfulness, such as, for instance, those concerning the definition of the rules on attribution of a given conduct to the State (determination of the "acts of the State" in various hypotheses, acts of organs of the State, acts of private individuals, acts of insurgents, etc.). For the purpose of the present survey, the interest of that historical debate lies exclusively in the fact that a series of statements was made in that context which contribute to the elucidation of the question of the possible causes of *force majeure* in international relations, as well as that of certain

<sup>855</sup> Eagleton, *op. cit.*, p. 125.

<sup>856</sup> As Personnaz says:

"... it is here that the two concepts of equal treatment and international standards for aliens clash. According to the first, which is chiefly upheld by the States of South America, the rights accorded to nationals are the most to which aliens can lay claim, and the latter may not in any case benefit from more favourable treatment than the former. On the other hand, according to the other concept, the so-called continental theory, the treatment of aliens is not conditioned by domestic law but only by international law, and should conform to a certain level determined by the international standards. It is the clash of these two theories that prevented the Conference on Codification from reaching an agreement, and it is understandable that, according to which theory is held, it may be affirmed or denied that in one case or another the State has incurred responsibility" (Personnaz, *op. cit.*, pp. 63 and 64).

See also A. H. Roth, *The Minimum Standard of International Law Applied to Aliens* (Leyden, Sijthoff, 1949) (thesis).

aspects of the scope of application of an exception of *force majeure* under international law, a point that has been underlined by Pons in the following passage:

The responsibility of the State for injury caused to aliens during internal disorder and revolutionary upheaval is perhaps the most controversial point in this matter. On the one hand, it is in connexion with such disturbances that most of the claims have been made. On the other, the States complained against have denied responsibility in this case more than in any other, finding in these circumstances independent of their will the typical excuse of state of emergency or *force majeure*.

It should come as no surprise, therefore, that the most widely opposing doctrines have been upheld in cases of riots and civil wars.<sup>857</sup>

539. Among writers belonging to the first of the three main tendencies which emerged from the doctrinal debate referred to above, namely the group which denied the responsibility of the State for injuries sustained by aliens in the course of civil wars, insurrections, revolutions, riots, mob violence, etc., some developed in effect the theory that such events constituted cases of *force majeure*.<sup>858</sup> On the other hand, some writers belonging to the less numerous group which affirmed the opposite view, that the State was liable for injuries sustained by aliens during those events, denied that civil wars, insurrections, revolutions, riots, mob violence, etc. could be considered cases of *force majeure*.<sup>859</sup> Rejecting an absolute rule of non-responsibility, as well as an absolute rule of responsibility, a third group of writers followed a variety of intermediate positions which came closer, more or less, to the views of those belonging to the first group or to those of the second group, depending on the individual writer concerned. Actually, those who adopted the so-called absolute position frequently attenuated their basic conclusion by also accepting certain exceptions. Ultimately, therefore, the matter turned on the question of when and to what extent civil wars, insurrections, revolutions, riots, mob violence, etc., could be considered as causes of *force majeure* justifying the corresponding exception.<sup>860</sup>

<sup>857</sup> Pons, *op. cit.*, p. 147.

<sup>858</sup> The non-responsibility of the State has also been defended by writers belonging to that group on the basis of other arguments, such as the principle of the independence and sovereignty of States; the principle of equal treatment of nationals and foreigners; the theory that the foreigner who settles in a given country assumes the risk to which he is exposed in case of civil war, insurrection, etc.; the theory that the existence of civil war, insurrection, etc., constitutes a condition of *force majeure*; etc. With the exception of Wiese, Latin American writers have in general followed this tendency, which has also been shared by several authors from other continents. It is in connexion with this issue, the responsibility of the States for injuries to aliens in case of civil war, revolutions, etc., that Podestá Costa elaborated what is known as the theory of the "community of fate".

<sup>859</sup> In support of the responsibility of the State, those writers advanced the well-known theories of "expropriation" (Brusa) and "*risque étatif*" (Fauchille), as well as others based on a "presumption *juris et de jure*" or on an "obligation *ex delicto*".

<sup>860</sup> On the position adopted by Calvo on the matter, see, for example, the comments by A. V. Freeman: "Recent aspects of the Calvo doctrine and the challenge to international law", *American Journal of International Law* (Washington, D.C.), vol. 40, No. 1

540. As indicated, certain writers who defended as the basic rule the thesis of the responsibility of the State for injuries to aliens caused in the course of civil wars, insurrections, revolutions, riots, mob violence, etc., took the position that the doctrine of *force majeure* could not be made applicable to such events. In the following passage by Brusa, for example, the notion of *force majeure* would seem to embrace only events emanating from the blind elementary forces of nature, that is to say, "acts of God":

Any riot or insurrection, any war, whether civil or international, can certainly not, if one simply looks at the real causes, be put on the same footing as a simple event of *force majeure*. *Force majeure* excludes the element of will, which, on the other hand, plays a very important part in acts of war or riot. Here and there, in both cases, equal mention is made of a state of emergency, but this emergency is still not a truly inevitable and irresistible event, an elemental act of the blind forces of nature, as in the case of an earthquake, a flood, a hailstorm or a fire.<sup>861</sup>

Reasoning along the same lines, Wiesse states that:

It is a fairly widely held view that injuries inflicted on foreigners in civil wars are of the same character as those arising from an international war: they are cases of *force majeure* which no one is obliged to make good. If the Government comes to the assistance of the innocent victims, it does so out of fairness and benevolence on its part, since such victims have no right to reparation, inasmuch as the State has no need to accept any blame for the injuries caused.

The basis of this doctrine is false in the case of both civil and international wars. *Force majeure* excludes the element of free will, which is the overriding factor in acts of war. There may be a state of emergency, but this emergency is not a truly unavoidable event, an elemental act of fate, as is the case with an earthquake, flood or fire.<sup>862</sup>

541. Likewise, Leval stated that "riots cannot, as a rule, be called '*actes de force majeure*'" because "they are not generally provoked by an unknown cause, and the duty of every Government is to prevent them".<sup>863</sup> For Goebel,

It is in general difficult to look upon civil wars and insurrections as cases of *vis major*, for these are matters from which it is obviously impossible to exclude absolutely the element of will ... Of course, the fact that the civil war itself is not a case of *vis major* does not preclude certain incidents during the insurrection from being so regarded.<sup>864</sup>

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(January 1946), pp. 132-133. For the Anglo-Saxon theory of "risk allocation", see F. S. Dunn, *The Protection of Nationals* (Baltimore, Johns Hopkins, 1932), pp. 133-136.

<sup>861</sup> E. Brusa, "Responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d'émeute ou de guerre civile" (report to the Institut de droit international), *Annuaire de l'Institut de droit international*, 1898 (Paris), vol. 17 (1898) p. 97.

<sup>862</sup> C. Wiesse, *Reglas de derecho internacional aplicables a las guerras civiles*, 2nd ed. (Lima, Torres Aguirre, 1905), pp. 87 and 88. [Translation by the Secretariat.]

<sup>863</sup> G. de Leval, "Diplomatic protection of citizens abroad" (paper read at the twenty-fourth Conference of the International Law Association), International Law Association, *Report of the Twenty-fourth Conference* (Portland, Maine, 1907) (London, West, Newman, 1908), p. 206.

<sup>864</sup> Goebel, *loc. cit.*, p. 815. The writer qualifies his position on the matter, however, by adding that "a civil war as *vis major* is primarily a question of fact" and that "this doctrine *vis major* is one to be invoked only in exceptional cases depending upon the circumstances of the case, but these circumstances must be grave and overwhelming" (*ibid.*). By this qualification, the writer under-

542. The restrictive concept of *force majeure* which emerges from the statements referred to above does not seem, however, to be shared by most of the international law writers who have examined the question of State responsibility for injuries to aliens. On the contrary, the prevailing view appears to be that *force majeure* may result not only from the intervention of natural forces but also from conditions created by a civil war, an insurrection, a revolution, a riot, mob violence, etc. The passages quoted below support the general proposition that the stress put by such civil disturbances upon the resources of the State, even of the most well organized State, could give rise to conditions legitimizing an exception of *force majeure*.

Von Bar:

The concept of *vis major* or *force majeure* is not so narrow or so absolute. It is well known that an act of brigandage or a measure taken in time of war, although dependent on human will, does not carry with it that share of responsibility that would be entailed in other circumstances.<sup>865</sup>

Seijas:

The British Government, like the Russian, French, Italian and Spanish, has declared and upheld the view that the State is not responsible for injuries caused to foreigners by revolutionary forces, or even by constitutional forces, when the injury has not been wilfully and deliberately inflicted.

...  
Every Government recognizes its obligation to keep the peace and to protect national and foreign property, but it is not always able to do so. In a good many cases, although not in most, the Government is not even able to ensure its own survival. When this is the case, how will it then be able to answer for that of individuals? It would be extremely unjust to try to impose an obligation on it or penalize it for an act in which it had had no part and which it had had no power to prevent ...<sup>866</sup>

Fiore:

Let us suppose that a country is torn by revolution and civil war, and that the Government, to suppress disorder, uses the means of repression necessary to safeguard the interests of the State and which are not absolutely prohibited by international law. If foreign nationals were injured thereby, the Government could not be declared responsible, or required to indemnify them for the injury sustained. If a Government neglected to do all that was necessary to protect the goods and property of the foreign nationals, and if it did not seek to repress the violence and the offences caused by its own citizens, it would be called upon to answer for the consequences of its culpable negligence; but if the harm was the result of *force majeure*, there would be no legal responsibility. The actions of a Government could not be paralysed by the need to protect the rights of foreign nationals.<sup>867</sup>

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lines the relative character of the concept of *force majeure*. See, on that point, paras. 544-547 below.

<sup>865</sup> L. von Bar, "De la responsabilité des Etats à raison des dommages soufferts par des étrangers en cas de troubles, d'émeute ou de guerre civile", *Revue de droit international et de législation comparée* (Brussels), and series, vol. 1 (1899) p. 466.

<sup>866</sup> R. F. Seijas, *El Derecho Internacional Hispano-Americano (Público y Privado)* (Caracas, El Monitor, 1884), vol. III, pp. 538, 539 and 563.

<sup>867</sup> P. Fiore, *Nouveau droit international public*, 2nd ed. (Paris, Durand et Pedone-Lauriel, 1885), vol. I, p. 583.



**Calvo:**

Aliens established in a country which is a prey to civil war, and to whom this state of affairs has caused injury, are not themselves entitled to compensation, unless it is positively established that the territorial Government had the means to protect them and that it neglected to use these means in order to shield them from all injury. These principles have been explicitly recognized in more than one instance by Governments in Europe and America.<sup>868</sup>

**Hall:**

When a Government is temporarily unable to control the acts of private persons within its dominions owing to insurrection or civil commotion, it is not responsible for injury which may be received by foreign subjects in their person or property in the course of the struggle, either through the measures which it may be obliged to take for the recovery of its authority, or through acts done by the part of the population which has broken loose from control ...<sup>869</sup>

**Escrive:**

A fortuitous act is an unexpected event, or *force majeure*, which can be neither foreseen nor resisted, such as a flood, shipwreck, fire, thunderbolt, act of mob violence, *popular uprising*, destruction of buildings brought about by some unforeseen misfortune or other similar event.<sup>870</sup>

**Despagnet:**

But aliens may sustain injury as the result of war, revolution or riot breaking out in the country in which they find themselves; it is universally admitted today that diplomatic or consular protection cannot be invoked in such a case, because an accident of *force majeure* is involved, wherein aliens run absolutely the same risk as the nationals of the country concerned. Moreover, it would place too great a restriction on the freedom of action of the belligerents or the Government resisting the insurgents to force them to respect the property and persons of aliens, particularly when it is often impossible to distinguish them during violent combat.<sup>871</sup>

**Arias:**

In the case of a rebellion or civil war, the first and most important interests of the State—its existence or that of its constitutional organs—are at stake, so that it becomes imperatively necessary for it to do its best in the avoidance of such commotions. Under these circumstances, it is evident, the State might find it *impossible* to ensure the safety of persons and property within its territory. Strong measures may be called for, in the carrying out of which private interests may be disregarded and consequently injured. The danger might be so imminent that it may demand exclusively all the attention of the Government. The State cannot then enforce the ordinary law and should not, therefore, be held liable for the damages that result. Thus, the well-known maxim *nemo tenetur ad impossibile* applies.

...

It must be recognized that the most efficient Government might see itself incapacitated from foreseeing or preventing unfortunate

<sup>868</sup> C. Calvo, *Le droit international théorique et pratique*, 5th ed. (Paris, Rousseau, 1896), vol. I, p. 240. This statement is found in a section of Calvo's treatise dealing with damages resulting from *force majeure*, public misfortunes or fires necessitating the taking of measures on behalf of public safety.

<sup>869</sup> W. E. Hall, *A Treatise on International Law*, 8th ed. (Oxford, Clarendon Press, 1924), p. 274.

<sup>870</sup> Quoted in the Sambiaggio case award: United Nations, *Reports of International Arbitral Awards*, vol. X (United Nations publication, Sales No. 60.V.4), p. 516. See also paras. 366–369 above.

<sup>871</sup> F. Despagnet, *Cours de droit international public*, 2nd ed. (Paris, Librairie de la Société du Recueil général des lois et des arrêts, 1899), p. 353.

occurrences. Certain civil commotions, like pestilences, cannot be put down by the State without regrettable happenings taking place. They are beyond the plane of reasonable care, and when they arise the Government, in virtue of its right of eminent domain, is empowered to resort to any measures that the necessity of the moment may call for, provided they do not conflict with ordinary principles of humanity, even though they may inflict damage or suspend the ordinary rights of the members of the community.

...

From the above discussion, it is clear that, recapitulating the main points, the following propositions may, incontestably, be put forward:

...

That, according to legal theory as expressed in the maxim *nemo tenetur ad impossibile*, states are not responsible for the injuries suffered by foreigners in their person or property in the course of a riot, an insurrection, or a civil war.<sup>872</sup>

**Guerrero:**

We do not share the opinion of those who deny that revolution is a case of *vis major*. In general, neither wars nor revolutions are desired by the State—the latter, indeed, even less so than the former. They almost invariably occur because some blind force, against which the public authorities are powerless, has been set in motion. No State is immune from the evil. Revolution bursts upon a country with all the brutal force of some convulsion of nature. Foreigners, as well as nationals, have to partake of the consequences and share in the good or evil fortune which these undesired and unforeseen events may bring.

...

A State cannot be held responsible for occurrences in a territory no longer under its authority or control, when a case of *vis major* prevents it from fulfilling its duties as protector.<sup>873</sup>

**Podestá Costa:**

No State has ever completely guaranteed that, however normally its institutions might be functioning, those rights [the rights of the population] would be absolutely protected from any violence, since no State has ever considered itself free from all concern with regard to internal order or has been able to rest completely assured that no unforeseen and uncontrollable violent situation might arise, compelling it to concentrate all its energies on defending the threatened general interests rather than on protecting the rights of the individual.

The State ensures the rights of the population within the area subject to its action and powers, exercised in complete good faith and as diligently and vigorously as possible. Natural events, like human acts, sometimes occur in such a way as to temporarily impede or prevent the population from exercising their rights, and no foresight or action on the part of the State can restore the exercise of those rights until some time has elapsed and it becomes possible to normalize the situation or re-establish institutional order.

...

Certainly no one can be blamed when the collective ills inflicted on a population are caused entirely by the blind forces of nature. Unquestionably, such occurrences are absolutely inexorable; they are manifestations of *vis divina, fatum* or *fatalitas*, to use the Roman terms. However, *force majeure* or "fortuitous event" can exist, even though the injurious occurrence may not be an inexorable act of nature. The performance of a duty can be prevented not only by an insuperable force attributable to natural phenomena

<sup>872</sup> Arias, *loc. cit.*, pp. 735–736, 740, 741 and 764.

<sup>873</sup> G. Guerrero, Rapporteur of the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law, Questionnaire No. 4 on "Responsibility of States for damage done in their territories to the person or property of foreigners" (C.46.M.23.1926.V), p. 12.

but also by an equally insuperable external event attributable to human factors...

The characteristics of *force majeure* occur to the maximum degree and in two forms at times of civil strife.

They generally occur with the outbreak of armed rebellion, which is an uncontrollable event (*cui resisti non potest*) and is very seldom foreseeable or in any case can never be prevented. It has been argued that the outbreak of civil strife is a foreseeable phenomenon in that an inept or oppressive Government knows that there is bound to be an uprising to overthrow it. There are no grounds for such an assertion. What if the insurrection is directed against a Government which is neither inept nor oppressive?

...  
However, the outbreak of rebellion, besides being an unforeseeable and inevitable event, cannot be attributed to the State. There are those who claim that the uprising must be attributed to the State on the grounds that it has been provoked by the excesses of the authorities. That argument, although it might be partly true in some instances, cannot be sustained in absolute terms and consequently becomes completely invalid. Political history contains numerous examples of civil strife breaking out in response, not to the pressure of the authorities, but to the ambitions of some leader or the ideals of a political group, the aim being to seize power through a revolutionary upheaval. Events of this kind cannot be attributed to the political community as a whole, particularly since the latter has often put an end to them by suppressing the rebellion.

There is every reason to think that the phenomenon of civil war is a typical example of *casus*. It generally takes the form of an act of irresistible force which occurs unexpectedly, so that it is impossible to prevent it; it is a phenomenon stemming from many social factors which the State is powerless to control or change completely and which, to a large extent, are beyond its sphere of action—all of which places it in a situation of force which, for a time, makes it impossible for its institutions to function.

The characteristics of *force majeure* appear in another form in civil wars, although less generally. They often accompany partial occurrences of armed struggle, since they are found in acts of force which the State must carry out in order to suppress sedition. Until the rebellion is suppressed, both the Government and the population find themselves in a true *status necessitatis*. In addition to the rights necessary for the existence and development of the individual, there are the higher and inalienable rights of the community, which are essential in order to ensure the existence of individual rights. If the political and institutional life of the State is threatened and the rights of the community endangered, the State has a duty to use every means to preserve them. This duty takes precedence over the rights of the individual. Professor Anzilotti has analysed this situation, viewing it in the light of the State's right of self-preservation. It is generally acknowledged, he says, that acts carried out in *status necessitatis* do not entail liability, even though they may be contrary to the rules of law. This principle is applicable in international relations, since the concept of *status necessitatis* is a general juridical concept encompassing all branches of law, even though having special justification and application in each one.<sup>874</sup>

#### Rousseau:

[concerning damage resulting from the fighting itself] ... As a general rule, international precedents admit here the non-responsibility of the State, through the application of the rules of the law of war ... International precedents usually justify this solution by an appeal to the exception of *force majeure*.<sup>875</sup>

#### Ullóa:

Another question which falls outside the normal framework of what is lawful and what is unlawful is that of State responsibility in cases of *force majeure*. This question is of such importance as to constitute one of the basic aspects of the problem of international responsibility in respect of civil wars or disorders the conduct of which exceeds the normal possibilities of prevention and suppression.<sup>876</sup>

543. Injuries sustained by aliens in the course of a civil war, an insurrection, a revolution, a riot, mob violence, etc., may originate not only in acts committed by organs of the State to suppress the insurgents or to re-establish order, but also in acts committed by the private individuals participating in those events or by insurgents as an organized group. They may result from the conflict itself, as well as from other measures adopted either by the State or by insurgents. A series of distinctions based upon such criteria is often made by doctrine for the purpose of excluding or accepting the responsibility of the State with regard to specific categories of acts. Some writers also distinguish, for the same purpose, between civil wars, insurrections and revolution, on the one hand, and riots and mob violence, on the other. Frequently, the "*force majeure*" argument is advanced to provide a doctrinal solution for problems which are today solved more in the context of the rules governing the attribution of a given conduct to the State rather than in the context of rules relating to circumstances precluding wrongfulness. Independently of its merits concerning the definition of rules on "attribution", the kind of argumentation in the former context serves to underline further the recognition that human events such as civil wars, insurrections, revolutions, riots, mob violence, etc., may give rise to a case of *force majeure*. Statements explaining the non-responsibility of the State for injuries caused to aliens by private individuals in the course of a revolution or insurrection or by unsuccessful insurgent forces, on the basis of the *force majeure* doctrine, such as the ones quoted below, illustrate the point:

#### Westlake:

... the maxim *nemo tenetur ad impossibilia* negatives any responsibility of the regular Government for an indignity which the insurgents may have offered it out of the reach of its forces.<sup>877</sup>

#### De Visscher:

It is above all in regard to damages sustained by aliens in the course of civil disturbances, riots or revolutions that State responsibility has been asserted. Here again, of course, it is a question of acts committed by private individuals and the situation is not juridically different from that envisaged earlier. Two reasons have contributed to drawing attention to it: first, the seriousness, the actual extent of the damages that can be caused in the circumstances, which has frequently decided foreign Governments to assert the international responsibility of the territorial State; second, the circumstance that by reason of these disturbances themselves the local authorities may have found it impossible to take any really

<sup>874</sup> Podestá Costa, *loc. cit.*, pp. 51–54.

<sup>875</sup> Rousseau, *op. cit.*, p. 378.

<sup>876</sup> Ullóa, *op. cit.*, p. 261.

<sup>877</sup> J. Westlake, *International Law*, 2nd ed. (Cambridge, University Press, 1910), part I, p. 330.

adequate preventive or repressive measures. International practice has, in effect, accepted here a case of *force majeure*; a Government cannot be held responsible for acts committed by insurgents when it has used such restricted authority as is available to it to repress a revolutionary movement directed against its own power ...<sup>878</sup>

#### Hershey:

... the law of necessity or the physical inability (*force majeure*) to furnish adequate protection under such circumstances usually absolves governments from responsibility in these cases.<sup>879</sup>

#### Garner:

As regards acts committed by the insurgents or rebels themselves, the rules governing the responsibility of the State for the acts of private persons are applicable. If the insurrectionary movement gets beyond the control of the State and a condition of *force majeure* comes into existence, so that it is physically impossible for the State to protect aliens against the acts of the insurgents, it is not liable to make reparation. But if the insurgents or rebels themselves succeed in overthrowing the established Government and replacing it with one of their own, the new Government is responsible for injuries resulting from acts committed by their forces under the same conditions that would have applied to the *de jure* Government had it succeeded. Recognition of the insurgents as a belligerent power, either by the parent State or the State whose nationals have suffered injury, relieves the former of responsibility for acts committed by the insurgents.<sup>880</sup>

#### Sánchez de Bustamante y Sirvén:

[concerning injuries caused by individuals in the course of a revolution or insurrection]: If they are not directed in particular fashion against aliens but against the Government of the country, they enter into the category of the normal risks and perils that residence in the country and doing business there carry with them. No-one can complain of them or base his claim upon them, and the more frequent or likely such occurrences are in the country in question, the juster this view is. Sometimes they are in the category of natural accidents, such as earthquake or tempest.<sup>881</sup>

#### Sibert:

... there will no longer be non-responsibility of the State in the case of civil war (or riot), in respect of the acts of insurgents (or rioters), if the victim of the prejudicial acts shows *proof* that the State did not do *all* that was in its power to avoid such consequences or to ensure that the act was punished. A certain degree of vigilance, either with a view to preventing the possible consequen-

ces of the disturbances, or to repressing their results, is therefore incumbent upon the State.<sup>882</sup>

#### Delbez:

... if the injuries result from measures taken by the insurgent Government, the State is responsible if the insurrection is successful (principle of the continuity of the State) and not responsible in the opposite case (principle of *force majeure*).<sup>883</sup>

#### Cheng:

It cannot be doubted that natural impossibility extinguishes any obligation. With regard to the duty of a State to protect aliens within its territorial jurisdiction, it has frequently been recognized that, both in the prevention and in the repression of crimes, a State may be faced with natural limitations, and that the duty of the State does not extend beyond these limits.<sup>884</sup>

#### O'Connell:

At the other end of the scale, when the group acquires such cohesion and relative independence of control as to be designated insurgents, the State ceases to be responsible for their wrongful actions, unless they successfully substitute themselves in the government of the country. Among the elements that constitute this independence are the "formidable" character of the uprising, the rapidity of the movement, the immobilizing of governmental forces, and the exclusion of governmental control from the area in question; and the annulment of responsibility is predicated on the vigour and effectiveness of the Government's reaction and upon its capacity to react in the instant case. Immunity from the claim follows inability to perform.<sup>885</sup>

#### Brownlie:

The general principles considered below apply to a variety of situations involving acts of violence either by persons not acting as agents of the lawful Government of a State, or by persons acting on behalf of a rival or candidate Government set up by insurgents. The latter may be described as a '*de facto* Government'. In the case of localized riots and mob violence, substantial neglect to take reasonable precautionary and preventive action and inattention amounting to official indifference or connivance will create responsibility for damage to foreign public and private property in the area. The principles stated with reference to various types of situation are all derivatives of the standard of due diligence.

Lord McNair (*International Law Opinions, op. cit.* vol. II, p. 245) extracts five principles from the reports of the legal advisers of the British Crown on the responsibility of lawful Governments for the consequences of insurrection and rebellion. The first three principles are as follows:

- (i) A State on whose territory an insurrection occurs is not responsible for loss or damage sustained by a foreigner, unless it can be shown that the Government of that State was negligent in the use of, or in the failure to use, the forces at its disposal for the prevention or suppression of the insurrection;
- (ii) This is a variable test, dependent on the circumstances of the insurrection;
- (iii) Such a State is not responsible for the damage resulting from military operations directed by its lawful Government, unless the damage was wanton or unnecessary, which appears to be substantially the same as the position of belligerent States in an international war.

<sup>878</sup> C. de Visscher, "La responsabilité des Etats" (*loc. cit.*), pp. 103-104. In the 4th edition of his *Théories et réalités en droit international public (op. cit.)*, p. 308, the same writer says:

"In such cases, the responsibility of the State only comes into play if it is shown that it has not used its authority or the forces at its disposal to prevent the prejudicial act or to secure the protection of the aliens, or again, if it has neglected to pursue or to punish the offenders when it was in a position to do so. These findings are based on the notion that the extent of responsibility is commensurate with the effectiveness of power".

<sup>879</sup> A. S. Hershey, *The Essentials of International Public Law and Organization*, (New York, Macmillan, 1927), p. 259.

<sup>880</sup> J. W. Garner, "Responsibility of States for injuries suffered by foreigners within their territories on account of mob violence, riots and insurrections", *Proceedings of the American Society of International Law at its twenty-first annual meeting, Washington, D.C., April 28-30, 1927* (Washington, D.C., 1927), p. 63.

<sup>881</sup> A. Sánchez de Bustamante y Sirvén, *Droit international public* (Paris, Sirey, 1936), vol. III, pp. 577-578.

<sup>882</sup> Sibert, *op. cit.*, p. 313.

<sup>883</sup> Delbez, *op. cit.*, p. 364.

<sup>884</sup> Cheng, *op. cit.*, p. 227.

<sup>885</sup> O'Connell, *op. cit.*, p. 969.

These principles are substantially similar to those presented by writers of various nationalities. The general rule of non-responsibility rests on the premises that, even in a régime of objective responsibility, there must exist a normal capacity to act, and a major internal upheaval is tantamount to *force majeure*. This is straightforward enough, but uncertainty arises when the qualifications put upon the general rule are examined ...<sup>886</sup>

544. The doctrinal debate on the responsibility of the State for injuries sustained by aliens in its territory in the course of civil wars, insurrections, revolutions, riots, mob violence, etc. has also contributed to the indication that *force majeure* is a concept relative in character. Its relativity results essentially from the need to take into account two factors before reaching a conclusion on the existence of the exception of *force majeure*: (a) the specific circumstances surrounding the case and, in particular, the existence of a direct nexus between the alleged conditions of *force majeure* and the conduct adopted, rendering impossible the performance of the obligation; (b) the actual content of the international obligation whose breach is alleged. The first of those two factors is mentioned by numerous authors, including Sánchez de Bustamante y Sirvén in the following passage:

The first exemption, that of an injury which must be attributed to *force majeure*, either physical or political, has its origin in private law, and Ulpian defines it as *omnem vim cui resisti non potest*. It is quite evident when it does not have its origin in the will of the responsible party itself; but its determination, in a multitude of circumstantial cases, is subject to proof and, where appropriate, to resort to arbitrators or the courts.<sup>887</sup>

Actually, this factor relates to one of the essential conditions of *force majeure* referred to above<sup>888</sup> and does not seem to require further elaboration here. The second factor is singled out mainly by those international law writers who establish a relationship between the possibility of invoking an exception of *force majeure* based on events which occurred during a civil war, an insurrection, a revolution, a riot or such violence and the duty of *due diligence*, a duty which is considered by such writers as part and parcel of a series of "primary rules" providing for the obligations of the State in connexion with the treatment of aliens.

545. As the statements quoted below indicate, in case of a civil war, insurrection, revolution, riot, mob violence, etc., State responsibility does not, for those writers, hinge upon the mere occurrence of such events, but upon a negligent failure upon the part of the State itself to behave in accordance with the rules of international law imposing the obligation to act with "due diligence" to avoid or to suppress such disturbances.

#### Borchard:

The Government is liable, however, where it fails to show due diligence in preventing or suppressing the riot, or where the cir-

cumstances indicate an insufficiency of protective measures or a complicity of government officers or agents in the disorder.<sup>889</sup>

#### Eagleton:

Neither mobs nor civil wars need be regarded—to summarize—as creating an especial status which would fix or deny responsibility for all cases included therein. *Force majeure*, as excusing responsibility, must be ruled out of consideration, except in so far as it may be fitted into the rule of due diligence. Certainly, it can not be accepted as including all riotous disturbances and all insurrections, and covering them with the cloak of its exemption. Nor, on the other hand, is it possible to assert that the State is always responsible in such cases. Damages due to mobs and civil wars can not be grouped; each case must be measured by the rule of due diligence, and of denial of justice sought. These rules are sufficiently comprehensive to cover all cases, and no extraordinary conception such as that of *force majeure* is needed to aid in ascertaining responsibility.<sup>890</sup>

#### Pons:

A primary rule emerges forcefully from practice: the State is not responsible if it has employed due diligence in exercising its duty of protection. It is also admitted that the burden of proof of lack of due diligence rests on the plaintiff. Such proof seems at first sight difficult to establish. It is not very likely that the State has shown negligence in preventing or repressing activities directed against its own security. Nevertheless, in many instances States have been ordered to pay compensation. In countries where the principle of authority is not very firmly based, it can happen that a Government, through pusillanimity, weakness, calculation, or even—the case is by no means unheard of—through connivance with the insurgents, has delayed in putting down a riot.

It must also be made clear that diligence is not judged in general but according to the particular circumstances of each case.<sup>891</sup>

#### Zannas:

It seems to us, however, that the concept of *force majeure* cannot have so absolute a character. It is truer to say that there is *force majeure* when a prejudicial event cannot be avoided by the use of all reasonable precautions. The excuse of *force majeure* would be a relative excuse, because it would be necessary to examine in each case whether reasonable preventive measures could have avoided the injury.

We may thus link the notion of *force majeure* with that of due diligence, since the principle of non-responsibility is limited by that rule ...

... Thus, *force majeure* may excuse a State from all responsibility, provided it has not failed in its obligation to exercise a certain diligence.

Once the relationship between these two concepts is admitted, it is possible, we believe, to accept the excuse of *force majeure* in analogous cases, provided that the exception is limited and corrected by the rule of due diligence.

... It seems to us, therefore, that the excuse of *force majeure* or fortuitous event can only be upheld if the prejudicial act could not have been avoided by the exercise of due diligence.<sup>892</sup>

<sup>886</sup> Brownlie, *op. cit.*, pp. 439–440.

<sup>887</sup> Sánchez de Bustamante y Sirvén, *op. cit.*, p. 526.

<sup>888</sup> See para. 531 above.

<sup>889</sup> E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (New York, Banks Law Publishing, 1928), p. 224.

<sup>890</sup> Eagleton, *op. cit.*, p. 156. See also his statement in *Proceedings of the American Society of International Law ... (op. cit.)* (for reference, see foot-note 876 above), p. 67.

<sup>891</sup> Pons, *op. cit.*, p. 154.

<sup>892</sup> Zannas, *op. cit.*, pp. 63–66.

## García Amador:

The State is responsible for injuries caused to an alien in consequence of riots, civil strife or other internal disturbances, if the constituted authority was manifestly negligent in taking the measures which, in such circumstances, are normally taken to prevent or punish the acts in question.<sup>893</sup>

## Accioly:

... In the protection of aliens against damages resulting from rioting or civil war, reference is frequently made to the principle of the *diligence* with which a State should act to forestall or prevent offences within its territory against individuals of other countries.

...

Thus therefore, on the subject of prejudicial acts, or rather of damage caused by insurgents, mutineers or the populace, it must be ascertained whether the State has not acted without due diligence to prevent the prejudicial acts and whether it has not sought at least to prevent them, or has not acted to repress such acts with due diligence.<sup>894</sup>

## Brownlie:

... At the outset, it will be noted that the general rule and the qualifications are stated in respect of damage to aliens on the territory of the State; this is unfortunate, since the nature of the qualifications (the conditions of responsibility) may vary according to the object of harm, so that, for example, if a diplomatic or consular agent is involved, a higher standard of conduct will be required. There is general agreement among writers that the rule of non-responsibility cannot apply where the Government concerned has failed to show due diligence. However, the decisions of tribunals and the other sources offer no definition of "due diligence". Obviously, no very dogmatic definition would be appropriate, since what is involved is a standard which will vary according to the circumstances. And yet, if "due diligence" be taken to denote a fairly high standard of conduct, the exception would overwhelm the rule. ...<sup>895</sup>

546. By emphasizing the relationship between "due diligence" and the recognition of an exception of *force majeure*, writers such as the ones quoted above point out not only the need to take account of the actual content of the "primary rules" of international law concerned but also of the first of the two factors indicated above,<sup>896</sup> because, however objective the test of "due diligence" may be, what "due diligence" is in a particular instance depends, in the last analysis, upon the concrete circumstances surrounding the case. "One must not be led astray on the objective character of the notion of diligence",<sup>897</sup> because, as the commentary on the Harvard Law School draft of 1929 expressly recognizes, "due diligence" "is a stan-

<sup>893</sup> Draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens, art. 11 (*Yearbook* ... 1957, vol. II, p. 130, document A/CN.4/106, annex).

<sup>894</sup> H. Accioly, *loc. cit.*, pp. 399 and 401. [Translation by the Secretariat.] Commenting on the question of the responsibility of the State for damages "caused by the armed forces or the authorities of the State during the repression of an insurrectional movement, simple riots or other disturbances", the writer considers that "these acts do not in principle entail the responsibility of the State, since they are in general acts of self-defence" (*ibid.*, p. 398).

<sup>895</sup> Brownlie, *op. cit.*, p. 440.

<sup>896</sup> See para. 544 above.

<sup>897</sup> Pons, *op. cit.*, p. 136.

dard, and not a definition".<sup>898</sup> The point has been developed by Zannas in the following terms:

What may reasonably be required of the power of the State cannot be determined *a priori*. The degree of care to be taken will depend on the circumstances of each particular case. Account must be taken, however, of an essential element which influences the degree of diligence: the element of anticipation.

If the event to be prevented can be anticipated, if the competent authorities knew or should have known of the possibility of injury, the State will be bound to a greater degree of vigilance. For one cannot demand the same degree of vigilance in the presence of sudden and unforeseeable events as in a situation which, by its very nature, was known and threatened general security. The easier it is to foresee, therefore, the more care will need to be shown in preventing possible damage. The possibility of foreseeing the damage will enable the importance of the eventual consequences of the lack of vigilance to be weighed. These two points are closely linked; in taking into account the eventual consequences of the negligence, we can only consider the apparent consequences of the danger to be prevented—consequences which are, in their turn, determined by the knowledge or the anticipation of the danger. ...

If the due diligence can be influenced by the knowledge which the government authorities had or should have had of the event to be prevented, it will be necessary to specify here the circumstances in which this knowledge can be established. This point depends in the first place on the circumstances of each particular case which an international tribunal has the duty to elucidate. There are, however, certain tests which can determine the knowledge of the authorities or their ability to foresee the prejudicial event, and these tests can cause variations in the degree of diligence required by international law.<sup>899</sup>

547. The conclusion reached by some international law writers within the context of State responsibility in cases of civil war, insurrections, revolutions, riots, mob violence, etc., i.e. that the exception of *force majeure* need not be considered beyond the degree to which it may fit into the rule of "due diligence", is sometimes explicitly extended by international law specialists to injuries caused in the course of an international war. The following statement by Sibert is particularly significant in that respect:

This conclusion leads naturally to the question whether *war*, as well as *revolution* and *rioting* ... will authorize the exception [of *force majeure*]. The point is important for neutrals sustaining injury within the territory of one of the belligerents. In the eighteenth century, in seeking to determine (*cf. Droit des gens*, Book III, chap. 15, para. 232) whether war requires the reparation of the damages caused by it or whether it is to be regarded as a case of *force majeure* precluding all responsibility, Vattel separated the point of *equity* from that of *law*. *In jure*, the distinction established by him between damages caused by the sovereign "freely and with forethought" and those engendered by *unavoidable necessity*, such as for example the ravages caused by artillery fire, referred, though without naming it, to the circumstances of *force majeure*, which, though often the fortune of war, it would be excessive to regard as its inevitable and inseparable outcome. Much later, other writers, too categorical, expressed the opinion that war and the damages it caused must always be regarded as cases of *vis major*.

There can be no doubt: history proves that, with greater wisdom and goodwill or with more forethought, many wars could have been avoided or waged otherwise than they were. Other writers, equally inclined to make categorical statements, and envisaging, it

<sup>898</sup> See para. 578 below.

<sup>899</sup> Zannas, *op. cit.*, pp. 107–109.

is true, the special case of civil wars, have denied that such circumstances can be assimilated to *force majeure*. It is true that in 1930 the Rapporteur of the Sub-Committee on responsibility of the Hague Conference for Codification came out against this point of view (the Guerrero report). ...

... The duty of the State in time of war is not to cry "every man for himself" but to continue to provide protection with all its power and by all its means. Exonerating it from responsibility in the name of *vis major* would be to invite it to abdicate, or at least to be content with the least effort. But to declare it to be responsible for everything, in respect of everybody, and in every circumstance of the struggle, would be tantamount to attributing to it an all-powerfulness that belies reality. War, even more than peace, takes place moment by moment and *case by case*. Each case, therefore, must be taken in isolation: was an injury caused? In principle the State is responsible; however, the authorities may be able to exonerate themselves by proving that *in the circumstances* they showed all *due diligence*; and this diligence is not an abstractly determined and omnivalent diligence but a diligence that will eventually be weighed by the arbitrator, who will ask himself whether, in the situation in which they found themselves, the agents of the State in question really did all that they could to prevent the injury. Slowly, this idea is gaining ground. In 1928, Eagleton accepted it in his fine work *The Responsibility of States in International Law* (p. 156). Two years earlier, it was emerging in the discussions at the Institut de droit international (at least in respect of the responsibility of the State in civil wars). When he was consulted in the case of the war damages of Swiss nationals (during the 1914 war) by the Reparations Committee, Mr. Alberic Rolin also took as his point of departure the idea that the State on whose territory the war is being pursued should not regard it as a pure case of *force majeure*.<sup>900</sup>

548. As appears from the above considerations, international doctrine would seem to consider that wars, insurrections, revolutions, riots, mob violence, etc., may be a cause of *force majeure*, as is generally recognized with regard to the forces of nature. As Oppenheim points out:

A State need not make any reparation for losses sustained by an alien through legitimate measures taken by administrative officials and military forces in time of war, insurrection, riot or public calamity, such as a fire, an epidemic outbreak of dangerous disease, and the like.<sup>901</sup>

On the other hand, many writers reject the view that wars, insurrections, revolutions, riots, mob violence, etc., constitute *per se force majeure*, without a further analysis of the circumstances surrounding *in concreto* the act concerned. Wars, insurrections, revolutions, riots, mob violence, etc., are not, therefore, regarded by them as a kind of "special category" of situations calling for particular rules concerning the definition of "*force majeure*" and its application as a defence. The paragraphs quoted below provide examples of that position:

Eagleton:

In either case, mass action, inspired by elemental human passions, becomes a great tidal wave of force, sweeping away the ordinary barriers set up for the protection of individuals, and rendering impossible the successful operation of the usual agencies of the State, or even its maximum endeavours. The debate over the State's responsibility for injuries suffered under such conditions has produced many theories as to the relation between the State and the alien; and the greatest disparity, both in opinion and

in cases, will be found to exist. It is believed, however, that there is no necessity calling for the establishment of an especial category of cases involving a so-called *vis major*. It will be found that the guiding formulae are still those which have been postulated in the foregoing discussion, and that these rules are of sufficient elasticity to cover the cases now to be considered.<sup>902</sup>

Strupp:

... that there is no international legal rule from which would ensue a *special* international responsibility on account of disturbances, civil wars, etc., whereby private individuals, the subjects of foreign States, have suffered losses. That is why we reach the conclusion that *a State cannot be made* responsible in such circumstances, *unless* it has, as in other instances, contravened another international obligation ...<sup>903</sup>

Pons:

... there is no juridical criterion of special international responsibility in the case of rioting and civil war. All the findings which we have reviewed can fall within the application of the general rules of responsibility, *inter alia* those of diligence and imputability. If it is a question of acts committed by insurgents, one will have recourse to the rules for responsibility for the acts of private persons; if it is a matter of acts committed by the government forces, one will resort to the rules for responsibility for the acts of agents of the State.

Special rules might merely bring us back to the dangerous theories of the law of necessity ...

Special rules would have another disadvantage: they might cause us to fall into empiricism. Responsibility would be invoked generally in abnormal circumstances. It is better to establish general rules that are flexible enough to embrace all circumstances than to apply to each of these cases particular rules whose specific field of application would always be very difficult to determine exactly.<sup>904</sup>

549. The general proposition noted in the preceding paragraphs also finds support in the fact that, as some international law writers point out, an identical impossibility of performing an international obligation may be created by forces of nature or by forces having a human origin, or even by a combination of those two kinds of causes. Moreover, the same type of conduct, otherwise "wrongful", may be adopted as a reaction to circumstances of *force majeure* originated either by forces of nature or by human factors or by both. For example, *prima facie* violations of the sovereignty and territorial integrity of States in time of peace or of rights of neutral States in time of armed conflict may occur for a variety of reasons and in a variety of circumstances. As Lissitzyn has pointed out:

... [Aerial intrusions] may be deliberate and with hostile or illicit intentions such as attack, reconnaissance, aid to subversive activities, smuggling, or calculated defiance of the territorial sovereign. They may be deliberate but with essentially harmless intentions such as shortening of flight or avoiding bad weather. They may be necessitated by distress or caused by mistakes. They may occur in peacetime or wartime; the territorial sovereign may be a neutral trying to safeguard its neutrality. The aircraft may be State aircraft (i.e., used in military, customs or police services) or

<sup>902</sup> Eagleton, *op. cit.*, p. 125.

<sup>903</sup> K. Strupp, "Responsabilité internationale de l'Etat en cas de dommages causés aux ressortissants d'un Etat étranger en cas de troubles, d'émeutes ou guerres civiles", International Law Association, *Report of the Thirty-first Conference* (Buenos Aires, 1922) (London, Sweet and Maxwell, 1923), vol. I, p. 133.

<sup>904</sup> Pons, *op. cit.*, pp. 156-157.

<sup>900</sup> Sibert, *op. cit.*, pp. 335-336.

<sup>901</sup> Oppenheim *op. cit.*, p. 364.

civil aircraft. State aircraft, furthermore, may be of combat or non-combat (e.g., military transport) kind, armed or unarmed.<sup>905</sup>

550. The nature of the material causes of *force majeure* and fortuitous event would appear to be considered by doctrine today as being without major relevance, unless, of course, the obligation concerned would provide otherwise. Even the element of relativeness, analysed by doctrine in connexion mainly with civil wars, revolutions, insurrections, riots, mob violence, etc., is actually inherent in any determination of *force majeure* or fortuitous event, whatever its material cause may be. Forces of nature beyond the power of the organs of the State to control may certainly render impossible the fulfilment of an international obligation. But those kinds of forces may render that fulfilment only more difficult. On the other hand, forces of nature can sometimes be controlled and can therefore be deliberately used by States. Self-induced impossibility of performance would exclude a determination of *force majeure* or fortuitous event, even if it had been provoked by the manipulation of natural forces.<sup>906</sup> Consequently, the mere presence in a given case of forces of nature is not sufficient in itself to conclude that *force majeure* or fortuitous event exists. What actually matters for such a determination is that the natural event or events invoked meet substantially all the conditions required by the international legal order for recognizing the existence of an exception of *force majeure* or fortuitous event. Moreover, if certain types of conduct adopted to wage a war, or suppress an insurrection, a revolution, a riot, mob violence, etc., are sometimes justified by certain writers by reference to circumstances precluding wrongfulness other than *force majeure*, such as state of emergency (*état de nécessité*), the same justification applies to conduct adopted to prevent a natural phenomenon, as is illustrated by Brownlie in the following passage:

... preventive action of a technical nature in case of a natural disaster having its origin in a neighbouring State may be treated as a unique type of case in which necessity still excuses. The action should be confined to natural disaster of considerable magnitude, since no bad faith can be imputed to the State taking preventive action in such a case.<sup>907</sup>

551. Furthermore, the primary rule concerned may have imposed upon the State an obligation to take preventive measures against events provoked by forces of nature or an obligation to avoid the creation of special risks that these forces of nature may materialize. In such cases, the mere presence of the forces of nature would not preclude *per se* an eventual determination of wrongfulness. The latter would be estab-

lished only if it were proved that the State had failed to take preventive measures, or to adopt the standard of care required by the obligation concerned. Already in 1928, Eagleton stated, in connexion with damages caused by forces of nature:

It may be suggested that human ingenuity has so well provided against such damages, through preventive measures, or insurance, that a State might conceivably be held, in the future, to responsibility for insufficient protection against floods (e.g., careless maintenance of dikes), or fire, or plague. Such provisions are already to be found in municipal laws, as, e.g. factory and sanitation laws.<sup>908</sup> More recently, in 1961, Reuter made the following comment:

Do not the rules of territorial sovereignty postulate a principle whereby any physical action making itself felt within the territory of a State from a source situated in the territory of another State (physical interference) is prohibited? If such a rule exists, it causes any prejudicial action having its physical origin in the territory of another State to be seen as a violation of international law; we might perhaps invoke in this sense such famous precedents as the Trail Refineries case. However, it is certain that this rule does not exist in as general a form as we have just stated. Would a State be responsible for the devastation wrought beyond its frontiers by a volcano situated on its territory? If torrential rains provoke the catastrophic flooding of a river which ravages not only the territory of the State on which the rain fell but also the neighbouring country through which the river flows, that State will have no claim to damage-interest. But if the flood is the result less of the rain than of the breaking of a dam, the problem changes. Although there can be no responsibility for a pure act of nature, as soon as human action or inaction is involved, the problem of responsibility appears.

Let us take the hypothesis of a broken dam. If one formulates a rule whereby the State must ensure that all the engineering works on its territory are proof against all accident, one will certainly remain within the realm of traditional responsibility; the plaintiff State will have to prove negligence on the part of the State involved, and the latter will be able, if necessary, to plead one of the classic causes of exoneration, such as *force majeure* (for example, if the dam broke as the result of an earthquake).

But one could formulate a slightly different rule, which would be as follows: a State has not the right to undertake on its territory activities which involve abnormal risks for other, particularly neighbouring, States. In this case, it is not the actualization of the risk, namely the disastrous accident, that creates responsibility, but the simple carrying out of the act, for example the building of the dam. From a formal point of view, such a rule, supposing that it existed, lets us remain within the realm of classic responsibility; it supposes standards and directives, quite difficult to establish, for defining an abnormal risk. Without being able to point to the existence of such a rule, we might perhaps find traces of it in the matter of neighbourly relations or in fields such as those of space or atomic experiments.

It is only necessary, however, to modify slightly the hypothetical rule that we have just formulated to leave the plane of traditional responsibility. It is enough to consider that certain risks, while they are sufficiently normal not to subject the enterprises causing them to any prohibition, do involve an obligation to make reparation for damages if the risk comes to pass. In this case, there is responsibility without any violation of a rule of international law. The action is lawful, but it requires compensation. The responsibility is dependent on a causal nexus. No-one can say at the present moment that such a rule exists in international law; but since man has never held back from the most dangerous experiments, it may well be that this rule will be adopted, at least partially. At all events, there have already been claims based on a purely causal nexus; in

<sup>905</sup> O. J. Lissitzyn, "The treatment of aerial intruders in recent practice and international law", *American Journal of International Law* (Washington, D.C.), vol. 47, No. 4 (October 1953), pp. 559-560.

<sup>906</sup> Actually, as certain writers indicate, a deliberate use of forces of nature could be regarded, in some instances and under certain conditions, as a use of force justifying measures of self-help.

<sup>907</sup> I. Brownlie, *International Law and the Use of Force* (Oxford, Clarendon Press, 1963), p. 376.

<sup>908</sup> Eagleton, *op. cit.*, p. 125, note 1.



certain cases, for example in respect of atomic accidents, compensation has been paid, but always *ex gratia*, so as to prevent any conclusion being drawn as far as the legal obligation is concerned.<sup>909</sup>

**e) Legal effects of *force majeure* and/or fortuitous event**

552. Among the international law writers who refer to *force majeure* and/or fortuitous event in the context of State responsibility for internationally wrongful acts, no dissenting opinion appears to exist as to the legal effects of those circumstances, once their existence in the case concerned has been duly established. The statement by Basdevant that "one who, being bound by an obligation, is rendered by an event of *force majeure* incapable of executing it, thereby escapes all responsibility"<sup>910</sup> seems to be endorsed unanimously, in one form or another, by all those writers. For them, *force majeure* has, in international law, as in domestic law, the effect of preventing the legal consequences normally attached by the legal order to an act or omission that otherwise would be qualified as "wrongful". That "the exception of *force majeure* is arguable in international public law, as well as in private law"<sup>911</sup> is generally recognized by doctrine.

553. The fact that some writers call *force majeure* and fortuitous event "circumstances precluding wrongfulness" while others prefer to term them "circumstances exonerating (the State) from responsibility" does not detract in any way from the conclusion referred to. No significant legal distinction is attached by doctrine to those two different forms of describing the effects of *force majeure* and fortuitous event in the field of State responsibility for internationally wrongful acts. Actually, the two expressions, "circumstances precluding wrongfulness" and "circumstances exonerating (the State) from responsibility", are similarly used in connexion with other circumstances, such as "state of emergency", "self-defence", "legitimate application of a sanction" and "consent of the injured State". It should be pointed out, however, that the expression "circumstances precluding wrongfulness" has been defended as being more proper to convey the legal concept involved. Ago, for example, says:

Much of the doctrine refers here, in general, not to circumstances precluding wrongfulness but to circumstances precluding responsibility. In other words, faced with an act that is in itself wrongful, international law would simply abstain from attributing its effects to a State; the delict would be imputed but not the responsibility. The erroneousness of this point of view seems obvious. ...

If the delict is an act in law characterized precisely by the attribution of an effect consisting of the creation of an obligation on the part of the author to make reparation, or of a power on the part of some other party to impose a sanction on him, it is obvious

<sup>909</sup> P. Reuter, "Principes de droit international public", *Recueil des cours* ..., 1961-II (Leyden, Sijthoff, 1962), vol. 103, pp. 591-593.

<sup>910</sup> See para. 9 above.

<sup>911</sup> See paras. 9 and 394 above.

that the concept of a wrongful act stripped of such legal consequences is a contradiction in terms. It is as meaningless as to call a juridical act a material manifestation of will not legally endowed with the effects proper to the juridical act ...

... in all cases where characterization as wrongful seems to be precluded, the presence in the case in point of that particular element that we rightly call circumstance precluding wrongfulness works in fact to offset the presence of another element that would be essential for qualification as wrongful; and it is through this that such a qualification is prevented.<sup>912</sup>

554. Some law writers supplement the conclusions that, as a general rule, *force majeure* and fortuitous event preclude wrongfulness by a reference to the concept of "attenuating circumstances". Quéneudec, for instance, says that when it "does not ... entirely justify the internationally wrongful act *force majeure* may play the role of an attenuating circumstance."<sup>913</sup> *Force majeure* and fortuitous event as legal concepts would not seem, however, to be considered by most writers as being linked to problems relating to the degree of "fault" or of the "breach of the obligation", but rather to the "absence of fault" or to the "absence of a breach of the obligation".

555. As indicated in the introduction,<sup>914</sup> most writers use the expression *force majeure* in a broad sense, namely as referring to *force majeure* as well as to fortuitous event. It happens also, although less frequently, that the expression fortuitous event is sometimes employed as meaning not only that circumstance but likewise *force majeure*.<sup>915</sup> Other writers, however, use both expressions.<sup>916</sup> The latter writers mention, generally speaking, *force majeure* to describe cases of lack of "voluntariness", reserving the term "fortuitous event" for cases involving lack of "foreseeability".<sup>917</sup> The convenience of using both expressions in order to cover all acts "which the most vigilant Government cannot prevent" and "for which the State could not be responsible" has been stressed by certain writers.<sup>918</sup> When using both expressions, international law writers do not make any differentiation as to the legal effects of *force majeure* and fortuitous event. Both circumstances are viewed by them as precluding wrongfulness, or as exonerating the State from the responsibility, for an act or omission that otherwise would be wrongful under international law.

556. The distinction between *force majeure* and fortuitous event could, however, have a great relevance within the context of the so-called responsibility for risk. In some domestic law systems, liability for risk is excluded in cases of "fortuitous event", but not in

<sup>912</sup> Ago, "Le délit international", *loc. cit.*, pp. 532-533.

<sup>913</sup> Quéneudec, *op. cit.*, p. 163.

<sup>914</sup> See para. 19 above.

<sup>915</sup> See, for example, Cohn, *loc. cit.*, p. 241.

<sup>916</sup> For example, Ago, Dunn, Fauchille, Hershey, Podestá Costa, Sibert, de Visscher, Zannas, etc.

<sup>917</sup> See, for instance, Ago, "La colpa...", *loc. cit.*, p. 177.

<sup>918</sup> See Sibert, *op. cit.*, p. 317. Referred to also by Zannas (*op. cit.*, p. 63).

cases of "force majeure" (and of "faute de la victime").<sup>919</sup> Certain international law writers appear also to hold that, as a general rule, fortuitous event excludes international liability in case of damage resulting from extra-hazardous activities. Quadri, for example, has stated in this respect:

It seems to us that one can only speak of true responsibility if the State has not taken all the safety measures conceivable in the present state of science and technology. Nuclear and cosmic liberty is not absolute but limited by the obligation to prevent any foreseeable damage. Only accidents that are unforeseeable (and, of course, not the result of a fault of the victim) can escape, therefore, from the principle of responsibility.<sup>920</sup>

557. *Force majeure* and fortuitous event preclude wrongfulness and exonerate the State from responsibility only while they actually exist. They do not abrogate or modify the international obligation concerned. If the impossibility created by *force majeure* or fortuitous event disappears, the obligor has to fulfil the obligation; otherwise, his conduct will become "wrongful" and entail international responsibility. This aspect of the matter has not escaped the attention of writers. Scelle, for instance, has said:

One must not, however, confuse lapse or disuse with *force majeure*. The latter, in other words, the impossibility of execution, affects regular, solid legal situations; it paralyses them but permits them eventually to revive. Lapse, on the other hand, definitively invalidates the rule of law, whether wholly or in part, and deprives it of its binding forces.<sup>921</sup>

And de Visscher stresses that

... there can be no question of invoking it [the *rebus sic stantibus* doctrine] when the execution of an international obligation is rendered impossible by the occurrence of a fortuitous event completely outside the expectations of the contracting parties. In all cases, *force majeure* is grounds for the complete release of the obligor.<sup>922</sup>

558. As has been indicated,<sup>923</sup> *force majeure* and fortuitous event are circumstances precluding wrongfulness of general application. They are susceptible of being invoked in connexion with customary, as well as conventional, international obligations. This does not mean, however, that the content of the obligation concerned (primary rule) is immaterial in establishing *in concreto* an exception of *force majeure* or of fortuitous event. Reference has already been made to the approach followed in this respect by the followers of the "objective theory" of international responsibility, as well as to the fact that supporters of

the "fault theory" likewise recognize that the application in a given case of such precluding circumstances as *force majeure* and fortuitous event may be excluded by the very content of the international obligation in question. A primary rule of international law may, therefore, limit the scope of application and, eventually, prevent the normal operation of an exception of *force majeure*, or fortuitous event. The relationship established by some writers between "*force majeure*" and "due diligence" in connexion with certain international obligations of conduct illustrates the point. Thus, the type of obligation provided for by the international rule concerned (obligation of conduct, obligation of result, obligation of event, etc.) may consequently also have a bearing on the application to a given case of an exception of *force majeure*, or of fortuitous event. Temporal factors and the kind of "internationally wrongful act" involved (continuing act, composite act, complex act, etc.) may also be highly relevant in that respect.

559. The existence of a state of international war or similar armed conflict is, of course, another factor that should be taken into account. Situations viewed as cases of *force majeure* under the international law of war could not be so recognized by the international law regulating relations in time of peace. Here again, the question is one concerning the determination of the content of the obligation concerned. As Dahm recalls:

The very right to wage war gives the belligerents rights which they can exercise without violating international law. A State whose armed forces inflict losses on the nationals of neutral States in the war zone in the course of military operations and in the framework of the international law of war, whether this takes place during an international war or a civil war, e.g., the suppression of insurgents, is not acting in violation of international law and therefore is not obliged to provide compensation for damages ...

The rule is, of course, restricted to genuine military operations and to the consequences of actual acts of war, and it applies only to acts which affect equally all persons and property present in the war zone. ...<sup>924</sup>

Developing the same idea, Giuliano states:

The outbreak of war between two States or the outbreak of civil war within a country are not, on the other hand, circumstances which exclude the wrongfulness of acts committed by the belligerent State against the persons or property of the belligerent adversary or neutral States. Those acts, which would undoubtedly be wrongful acts under the international law applicable in time of peace, become in fact legitimate under the rules of international law of war and neutrality. This does not, of course, mean that, even in such cases, a State may not commit internationally wrongful acts which, as such, may give rise to the consequence which general international law attaches to the behaviour of the State, in so far as such behaviour constitutes a violation of obligations deriving from rules of international law; in the case in question, a violation of the obligations which devolve even upon the belligerent State or the State which is engaged in a civil war and which take

<sup>919</sup> According, for example, to A. de Laubadère (*Traité élémentaire de droit administratif* (Paris, Librairie générale de droit et de jurisprudence, 1953), pp. 490–491), liability is excluded "by the simple fortuitous event, in other words the circumstance that the cause of the accident is unknown; this last feature distinguishes the system of *risk* from the system of *presumption of fault*, in which responsibility is precluded both by fortuitous event and *force majeure*".

<sup>920</sup> Quadri, *loc. cit.*, p. 470.

<sup>921</sup> G. Scelle, "Règles générales du droit de la paix", *Recueil des cours ... 1933–IV* (Paris, Sirey, 1934), vol. 46, p. 477.

<sup>922</sup> C. de Visscher, "Les lois de la guerre et la théorie de la nécessité", *Revue générale du droit international public* (Paris), vol. XXIV, No. 1 (January–March 1917), p. 105.

<sup>923</sup> See paras. 31–37 above.

<sup>924</sup> Dahm, *op. cit.*, pp. 213–214. Regarding the war claims situation. Bishop concludes that "the international law of war claims is among the least satisfactory part of the law of State responsibility" (W. W. Bishop, "General course of public international law, 1965, *Recueil des cours ... 1965–II* (Leyden, Sijthoff, 1965), vol. 115, p. 403).

the form of a series of limits imposed on their freedom of action albeit expanded.<sup>925</sup>

560. Finally, reference should be made to the various views expressed by experts in international law concerning the admissibility of an exception of *force majeure* or fortuitous event in connexion with an alleged breach of certain rules of international law regulating the conduct of States during hostilities, in the light, in particular, of the wording of article 3 of The Hague Convention (IV) of 18 October 1907.

#### Anzilotti:

A notable example of it is offered by article 3 of the Hague Convention of 18 October 1907 concerning the laws and customs of land warfare, under the terms of which a belligerent State which violates the provisions of the regulations annexed to the Convention is liable to pay damages and to this end is declared to be "responsible for all acts committed by members of its armed forces". The legislative history, as well as the text of the provision, show quite clearly—and even writers who in principle favour the idea of fault recognize it—that the intent of the article was to sanction a system of purely objective responsibility.<sup>926</sup>

#### Ago:

In this connexion, it seems necessary to me to draw attention to an error into which doctrine seems to have fallen (Anzilotti, *Corso*, p. 444; Strupp, *Das völkerr. Delikt*, p. 51; Verdross, "Règles générales du droit international de la paix", *Recueil des cours de l'Académie de droit international*, 1929-V, p. 466; Monaco, *La responsabilité...*, p. 68; etc.), when it maintains that, in article 3 of the Fourth Hague Convention of 18 October 1907 on the laws and customs of land warfare, States adopted a system of objective responsibility when they declared the State responsible "for all acts committed by members of its armed forces". The error has been to assimilate the responsibility of the State for the acts of members of its armed forces to cases of responsibility for the acts of private persons, whereas it is obvious that these persons are true and proper organs of the State. The element of fault must not, therefore, be looked for in the action of higher organs of the State seeking to prevent breaches of international law by troops (see, in this connexion, see Hofer, *Der Schadenersatz im Landkriegsrecht* (Tübingen, 1913), pp. 26 *et seq.*), but rather in the action of individuals belonging to the armed forces, who are themselves organs of the State able to violate the international rules governing the conduct of war. Certainly, article 3 did not intend to establish a responsibility of the State itself for breaches of the laws of war committed through fortuitous event or *force majeure*.<sup>927</sup>

#### Sperduti:

And indeed the truth seems to lie with those authors who, drawing upon the preparatory work of the Fourth Hague Convention of 18 October 1907, interpret article 3 of that Convention as sanctioning the objective responsibility of a belligerent for acts contrary to the annexed Regulations Concerning the Laws and Customs of Land Warfare, committed by members of its armed forces. Ago, on the other hand, does not share this view. He objects, *inter alia*, that that rule cannot be understood to mean that a belligerent is responsible for acts which are objectively contrary to the Regulations, even when committed by members of its armed forces

acting under *force majeure* and hence without fault. Of course, it may be agreed that there is no responsibility in the case of *force majeure*, but that in no way means that the rule may not then be interpreted as sanctioning objective responsibility. *Force majeure* exerts, with respect to an abstract entity's responsibility—a responsibility which derives from the premise that the behaviour of an individual acting as an organ of that entity is as imputable to the entity as the entity's own voluntary behaviour—an influence analogous to violence against the person of organs with regard to the validity of legal instruments. In both cases, in view of the psychological impossibility of determining (*vis absoluta*) or of freely determining (*vis compulsiva*) to act as one should, the activity originated by the individual-organ either may not be regarded as an activity of the entity, or, in any event, because of the unusual circumstances, does not give rise to the consequences ensuing from an activity of the entity, and is therefore legally in the same category as an activity not of the entity, or an activity not imputable to the entity; hence, we cannot wonder, nor is there any reason to wonder, whether or not the entity has acted culpably.

Another question is whether the situation of *force majeure* can be avoided by exercising a certain due diligence; and, whether, therefore, a State may sometimes be held responsible for damage caused by the acts of its organs, which, in so far as they have acted under *force majeure*, cannot be regarded as having acted as the organs of the State or under the conditions for the normal action of its organs. The aforementioned rule might even be interpreted to mean that it does not merely sanction the objective responsibility of the belligerent States for acts imputable to them, but that it establishes the responsibility for all extrinsic behaviour by members of their respective armed forces. However, if interpreted in the narrower sense, as seems more appropriate, the rule may quite reasonably be understood as intended to establish when responsibility arises independently of fault, and not really to exclude responsibility through fault; or not really as intended to limit to the cases of responsibility covered by it the responsibility of a belligerent under the laws and customs of land warfare, even if, apart from those cases themselves, such responsibility might already be sufficiently justified on the basis of the general principles of fault.<sup>43</sup> That problem therefore remains to be solved on the basis of general principles of international law.

<sup>43</sup> In other words, what seems to be certain is that the rule contained in article 3 cannot be invoked indiscriminately either to affirm or to exclude the responsibility of a belligerent for damage inflicted in cases of *force majeure* by members of its armed forces. Either the rule should be understood as intended to give effect to the principle of international responsibility through fault, in which case it is reasonable to interpret it as covering, broadly speaking, damage inflicted by members of a belligerent's armed forces, in so far as it is inflicted under conditions which might inculpate the belligerent, and hence, even if the fault consists in having failed to avoid a situation of *force majeure* when that would have been possible by acting according to the law; or the rule might, as seems likely, be the application of a principle of objective international responsibility, and hence be interpreted as not being concerned with the possible role of the circumstances of fault, in which case it may be sensibly interpreted only if it is understood to cover injurious acts which could be directly imputable to a belligerent; the alternative would be the obviously erroneous conclusion that a belligerent is responsible for acts which have occurred under the most extraordinary conditions of *force majeure*. Equally erroneous, however, would be the conclusion which, by limiting in the sense already indicated the hypotheses of responsibility covered and assessed by the rule, would, on the other hand, ascribe to the rule the function of thus exhausting the question of any possible responsibility in relation to the laws and customs of land warfare, so that no room would be left for responsibility based upon general principles of fault, even when it is possible to infer from them the responsibility of a belligerent for not having avoided a situation of *force majeure*, by acting according to the law.<sup>928</sup>

#### Kelsen:

Thus, according to article 3 of the Hague Convention of 1907 on the laws and customs of land warfare, a belligerent State is responsible for any violation of the rules contained in that Convention, whether committed by one of its organs or by members of its armed forces not acting in their capacity as such organs. This

<sup>925</sup> Giuliano, *op. cit.*, p. 603.

<sup>926</sup> Anzilotti, *Cours de droit international, op. cit.*, p. 499.

<sup>927</sup> Ago, "Le délit international", *loc. cit.*, p. 493, note (1); Italian text in "La colpa...", *loc. cit.*, pp. 201–202, note (1).

<sup>928</sup> Sperduti, *loc. cit.*, pp. 102–104.

means that the belligerent State is obliged to pay compensation for the damage caused, even if the violation was not committed intentionally or through negligence.<sup>929</sup>

#### Quadri:

The most famous example in which we speak about objective responsibility, without fault, is that of article 3 of the Fourth Hague Convention of 18 October 1907 on the laws and customs of land warfare, which holds the State responsible for "all acts committed by members of its armed forces" in violation of the regulations annexed to the Convention. In this case, one may effectively admit that there is an international obligation of guaranty, because the idea of an absolute presumption of fault in regard to the prevention of such acts is illogical, even if the strictness of military discipline, the rigorous control of the State over its armed forces, etc., could lead to the presumption to a certain extent that

<sup>929</sup> H. Kelsen, "Théorie du droit international public", *Recueil des cours ...*, 1953-III (Leyden, Sijthoff, 1955), vol. 84, p. 93.

there had been some culpable neglect on the part of the State. Considerations of another kind are added to those that might justify simple responsibility: the possibility for belligerent States of foisting upon individual members of their armed forces exclusive responsibility for the crimes committed, the extraordinary difficulties encountered in establishing the circumstances justifying or precluding responsibility, and above all the use of offensive weapons and the exercise of authority that are particular attributes of the military. This is without taking into account the fact that it is very often necessary to respond promptly, in order not to prejudice situations. It remains true, nevertheless, that it is a quite exceptional provision which cannot have attributed to it the purely declaratory nature of international common law, and which in practice has not played the role that might have been expected. The situation resulting from the Peace Treaties allows serious doubts to subsist regarding the effective nature of the rule in question.<sup>930</sup>

<sup>930</sup> Quadri, *loc. cit.*, pp. 464-465.

## SECTION 2. CODIFICATION DRAFTS PREPARED BY LEARNED SOCIETIES OR PRIVATE INDIVIDUALS

561. For the purpose of the present survey, codification drafts prepared by learned societies and private individuals—referred to in the first report by the Special Rapporteur for the topic of State responsibility, Mr. Roberto Ago, submitted to the International Law Commission in 1969 and supplemented in 1971,<sup>931</sup>—have been grouped as follows: (a) Drafts referring expressly to *force majeure* (*lato sensu*); (b) Drafts containing specific "justifications" susceptible of being applied to cases of *force majeure* and "fortuitous event"; (c) Drafts referring to notions such as "fault", "wilfulness", "due diligence", etc., without distinguishing between "acts" and "omissions"; (d) Drafts referring to the notions of "fault" or "due care" with regard to "omissions"; (e) Other drafts.

### (a) Drafts referring expressly to *force majeure* (*lato sensu*)<sup>932</sup>

562. The 1961 revised draft on "Responsibility of the State for injuries caused in its territory to the person or property of aliens" by García Amador,<sup>933</sup> former Special Rapporteur for the topic of State responsibility, contains no general provision dealing with the question whether, in order to be imputable to the State, an act or omission must have been deliberate and wilful, or whether, for the purpose of the imputability of the act or omission, the mere occurrence of an event which is objectively contrary to interna-

tional law is sufficient.<sup>934</sup> However, elements such as *culpa* or *dolus* are present in several specific provisions of the draft dealing with acts and omissions which may give rise to responsibility (provisions which set forth rules concerning the treatment of aliens), as well as in article 17 (Exonerating and extenuating circumstances) included in the chapter of the draft (chap. V) devoted to "imputability" of acts or omissions to the State.

563. Article 17 expressly provides for *force majeure* as a circumstance capable of exonerating the State from responsibility or of extenuating the responsibility attributable to it. The relevant passages of the article read as follows:

1. An act or omission shall not be imputable to the State if it is the consequence of *force majeure* which makes it impossible for the State to perform the international obligation in question and which was not the consequence of an act or omission of its own organs or officials.

...

4. *Force majeure*, ... if not admissible as grounds for exoneration from responsibility, shall operate as extenuating circumstances for the purposes mentioned in article 26, paragraph 4, of this draft.<sup>935</sup>

564. This formulation reflects the conclusions reached in 1958 by García Amador in his third report,<sup>936</sup>

<sup>934</sup> For the purpose of the draft, "international responsibility" is defined as involving the duty to make reparation for injuries caused in the territory of the State to the person or property of aliens, if such injuries "are the consequence of some act or omission on the part of its organs or officials which contravenes the international obligations of the State" (article 2, para. 1) (*ibid.*, p. 46).

<sup>935</sup> Paragraph 4 of article 26 (Restitution and pecuniary damages) states that, in the determination of the nature and measure of the reparation, the circumstances described as extenuating circumstances in article 17, paragraph 4, of the draft shall be taken into account.

<sup>936</sup> *Yearbook ... 1958*, vol. II, pp. 47 *et seq.*, document A/CN.4/111.

<sup>931</sup> *Yearbook ... 1969*, vol. II, pp. 141 *et seq.*, document A/CN.4/217 and Add.1, annexes; and *Yearbook ... 1971*, vol. II (Part One), document A/CN.4/217/Add.2.

<sup>932</sup> i.e., including "fortuitous event".

<sup>933</sup> *Yearbook ... 1961*, vol. II, pp. 46 *et seq.*, document A/CN.4/134 and Add.1, addendum.

after examining international case law relating to *force majeure* as an exonerating or extenuating circumstance.<sup>937</sup> These conclusions are summed up, by the former Special Rapporteur, in that report as follows:

... the foregoing supports the view that the defence of *force majeure* is recognized in principle by international law; that in this law its validity or admissibility is contingent on conditions which are no less strict, or even stricter, than those governing the defence of *force majeure* in municipal law; that the most important of these conditions and that which dominates the notion of *force majeure*, is "uncontrollableness"; and that where *force majeure* is not valid or admissible as a ground exonerating from responsibility, it may be valid or admissible as an extenuating circumstance for the purposes of fixing the quantum of reparation of the injury sustained.<sup>938</sup>

565. As indicated above, the element of *culpa* is also present in provisions of the draft establishing rules concerning the treatment of aliens, the violation of which may give rise to State responsibility. For instance, "an evident intention of causing injury to the alien" is referred to in article 3 (Acts or omissions involving denial of justice), a "detention order ... based on *bona fide* suspicion" in article 4 (Deprivation of liberty), acts or omissions "manifestly arbitrary or unjustified" in article 5 (Expulsion and other forms of interference with freedom of movement); etc. In this connexion, the provisions relating to the State obligation to protect aliens against acts of individuals are particularly revealing. Article 7, paragraph 1, provides, for example, that the State is responsible for the injuries caused to an alien by illegal acts of individuals, whether isolated or committed in the course of internal disturbances (riots, mob violence or civil war), "if the authorities were manifestly negligent in taking the measures which, in view of the circumstances, are normally taken to prevent the commission of such acts", and paragraph 2 of the article adds:

2. The circumstances mentioned in the foregoing paragraph shall include, in particular, the extent to which the injurious act could have been foreseen and the physical possibility of preventing its commission with resources available to the State.

Article 8 also makes the State responsible in cases of "connivance, complicity or participation of the authorities in the injurious act of the individual", and "if the authorities were manifestly and inexcusably negligent in the prosecution, trial and punishment of the persons guilty of the injurious act".

566. The *draft convention on international responsibility published in 1973 by two authors of the German Democratic Republic, Messrs. B. Graefrath and P. A. Steiniger*, provides in its article 10 that "The obli-

gation to indemnify does not apply in cases of *force majeure* or of a state of emergency".<sup>939</sup>

**(b) Drafts containing specific "justifications" susceptible of being applied to cases of *force majeure* and fortuitous event.**

567. Part IV (Responsibility of States for injuries to aliens) of the "*Restatement of the law*" prepared in 1965 by the American Law Institute<sup>940</sup> begins by stating, in section 164, that:

A State is responsible under international law for injury to an alien caused by conduct subject to its jurisdiction, that is attributable to the State and wrongful under international law.

Such conduct is considered "wrongful" if it departs from the international standard of justice required for the treatment of aliens or constitutes a violation of an international agreement (sect. 165).

568. Sections 197 to 201 of the Restatement enumerate a series of "justifications", some of which are susceptible of being applied to cases of *force majeure* and fortuitous event. Those "justifications"—which are linked to the "objective element" of the internationally wrongful act referred to in section 165 and not to the rules governing attribution of conduct of organs and agents to the State (sects. 169 and 170) or to the rules establishing the responsibility of the State from failure to protect aliens from private injury (sect. 183)—read as follows:

**197. Police power and law enforcement**

(1) Conduct attributable to a State and causing damage to an alien does not depart from the international standard of justice indicated in section 165 if it is reasonably necessary for

(a) The maintenance of public order, safety, or health, or

(b) The enforcement of any law of the State (including any revenue law) that does not itself depart from the international standard.

(2) The rule in subsection (1) does not justify failure to comply with the requirements of procedural justice stated in sections 179-182<sup>941</sup> except as stated in section 199 with respect to emergencies.

**198. Currency control**

Conduct attributable to a State and causing damage to an alien does not depart from the international standard of justice indicated in section 165 if it is reasonably necessary in order to control the value of the currency or to protect the foreign exchange resources of the State.

**199. Emergencies**

Conduct attributable to a State and causing damage to an alien does not depart from the international standard of justice indicated in section 165 if it is reasonably necessary to conserve life or property in the case of disaster or other serious emergency.

<sup>937</sup> The Special Rapporteur mentions (*ibid.*, pp. 51-52, document A/CN.4/111, art. 13, paras. 6-8 of the commentary) the Russian Indemnity case (1912) (see paras. 388-394 above); the case concerning the payment of various Serbian loans issued in France (1929) (see paras. 263-268 above); and the Société Commerciale de Belgique (1939) (see paras. 274-290 above).

<sup>938</sup> *Ibid.*, p. 52, art. 13, para. 9 of the commentary.

<sup>939</sup> The original German text reads as follows: "Die Entschädigungspflicht entfällt bei höherer Gewalt sowie im Falle eines Staatsnotstandes" (*Neue Justiz* (Berlin), 1973, vol. 8, No. 8, p. 228).

<sup>940</sup> See *Yearbook ... 1971*, vol. II (Part One), p. 193, document A/CN.4/217/Add.2.

<sup>941</sup> Paras. 179 to 182 deal with arrest and detention of aliens, denial of trial or other proceedings, fairness of trial or other proceedings, and unjust determination.

569. It should be noted that, as worded, the "justifications" quoted above would appear to envisage cases of *force majeure* and fortuitous event due to natural as well as human causes. The necessity of "currency control", frequently invoked in international practice as justifying pleas of *force majeure*, is expressly recognized. On the other hand, section 201 limits somewhat the scope of application of the "justifications" by providing that they do not relieve a State of responsibility "for conduct that is contrary to an international agreement" or "for conduct that discriminates against an alien".

570. *The 1961 Harvard Law School draft convention on the international responsibility of States for injuries to aliens*,<sup>942</sup> prepared by Sohn and Baxter, combines provisions which take into account the "intentional" or "negligent" element with others based on "liability without fault". The draft begins by stating, as a basic principle of State responsibility, that a State is internationally responsible for an act or omission which, under international law, is wrongful, is attributable to that State and causes an injury to an alien (art. 1, para. 1, first sentence). Afterwards, it proceeds to define different categories of internationally wrongful acts, referring to the "intentional" or "negligent" element in some of them only, and deals with the question of the circumstances precluding wrongfulness ("justifications", to use the language of the draft) differently according to whether or not the "intentional" or "negligent" element is required for the category of internationally wrongful act concerned.

571. To understand the system established by the draft, it is, therefore, necessary to bear in mind the different categories of internationally wrongful acts which are defined, in article 3, as follows:

1. An act or omission which is attributable to a State and causes an injury to an alien is "wrongful", as the term is used in this Convention:

- (a) If, without sufficient justification, it is intended to cause, or to facilitate the causing of, injury;
- (b) If, without sufficient justification, it creates an unreasonable risk of injury through a failure to exercise due care;
- (c) If it is an act or omission defined in articles 5 to 12; or
- (d) If it violates a treaty.

572. For the categories of wrongs defined in subparagraphs 1 (c) and (d) of article 3, the only "justifications" recognized are those which could eventually be invoked on the basis of the formulations adopted for the rules on the treatment of aliens in articles 5 to 12 of the draft itself or of the provisions of the treaty concerned.<sup>943</sup> It would appear, therefore, that for

<sup>942</sup> See *Yearbook ... 1969*, vol. II, pp. 142 *et seq.*, document A/CN.4/217 and Add.1, annex VII.

<sup>943</sup> Articles 5 to 12 set forth rules on the treatment of aliens with regard to the following matters: arrest and detention (art. 5); denial of access to a tribunal or an administrative authority (art. 6); denial of a fair hearing (art. 7); adverse decisions and judgments (art. 8); destruction of and damage to property (art. 9); taking and deprivation of use or enjoyment of property (art. 10); deprivation of means of livelihood (art. 11); violation, annulment, and modification of contracts and concession (art. 12).

those categories of wrongs the mere fact that an act or omission, amounting to a breach of rules embodied in articles 5 to 12 or of a treaty provision, takes place is sufficient to engage the responsibility of the State. It should, however, be pointed out that several provisions of those articles contain terms and expressions such as "clear and discriminatory violation", "arbitrary action", "unreasonable departures", "unreasonable interference", "reasonable", "unduly", "inadequate", "fairness", "required by circumstances", "necessity", "maintenance of public order, health, or morality", "abuse of the powers", "fair value", "valid exercise of belligerent rights", "incidental to the normal operation of the laws", "clear threat", etc. It would seem therefore that, in the establishment of a violation of some of the rules set forth in articles 5 to 12 of the draft, *force majeure* and fortuitous event cannot be overlooked. So far as treaties are concerned, the commentary on article 4 explains that the concept of a treaty violation implies that the violating State does not have sufficient justification either under a provision of the treaty itself or under general international law.<sup>944</sup>

573. On the other hand, for the categories of wrongs defined in subparagraphs 1 (a) and (b) of article 3, namely for those involving "intent" or "negligence", the draft provides for specific "justifications", although only to the extent that they are considered to be a "sufficient justification" under article 4. Paragraphs 1 to 4 of that article enumerate a series of "sufficient justifications" or excuses regarding matters such as: the imposition of punishment for the commission of a crime; the actual necessity of maintaining public order, health or morality; the valid exercise of belligerent or neutral rights or duties; and the contributory fault of the injured alien. Paragraph 5 contains a residual rule, according to which,

in circumstances other than those enumerated in paragraphs 1 to 4 ... "sufficient justification" ... exists only when the particular circumstances are recognized by the principal legal systems of the world as constituting such justification.<sup>945</sup>

However narrow the scope of application of this residual rule may be, it provides a legal basis upon which a respondent State could invoke, in certain situations, *force majeure* or fortuitous event as circumstances precluding wrongfulness.

**(c) Drafts referring to notions such as "fault", "wilfulness", "due diligence", etc. without distinguishing between "acts" and "omissions"**

574. The rules concerning the responsibility of a State in relation to the life, person and property of aliens contained in the *Draft code of international*

<sup>944</sup> See Harvard Law School, *Convention on the International Responsibility of States for Injuries to Aliens, Draft No. 12 with Explanatory Notes* (Cambridge, Mass., 1961), p. 73.

<sup>945</sup> Article 13, para. 1, of the draft specifies that:

"Failure to exercise due diligence to afford protection to an alien ... against any act wrongfully committed by any person, acting singly or in concert with others, is wrongful:

law, adopted by the Japanese branch of the International Law Association and the Kokusaiho Gakkwai (International Law Association of Japan) in 1926<sup>946</sup> states, in article 1, that:

A State is responsible for injuries suffered by aliens within its territories in life, person or property through wilful act, default or negligence of the official authorities in the discharge of their official functions, if such act, default or negligence constitutes a violation of international duty resting upon the State to which the said authorities belong.

In the case of injuries caused by an act or omission of an official acting outside official functions or of a private person, article 2 provides that the State to which the injured alien belongs may demand redress if "the State within which the injury occurred has unlawfully refused or neglected to give proper judicial remedies". Responsibility for injuries sustained by an alien in time of an insurrection or mob violence (art. 3) cannot be disclaimed by the territorial State if the reason was that the person in question "was an alien or was of a particular nationality".

575. The draft on "International responsibility of States for injuries on their territory to the person or property of foreigners", adopted by the Institute of International Law, at its 1927 Lausanne session,<sup>947</sup> follows the "fault" and "negligence" criteria. The basic principle that "the State is responsible for injuries caused to foreigners by any action or omission contrary to its international obligations" is qualified by the proviso that:

This responsibility of the State does not exist if the lack of observance of the obligation is not a consequence of a fault of its organs, unless in the particular case a conventional or customary rule, special to the matter, admits of responsibility without fault (rule I, *in fine*).

With regard to injuries caused by private individuals, State responsibility is not entailed "except when the injury results from the fact" that the State "has omitted to take the measures to which, under the circumstances, it was proper normally to resort in order to prevent or check such actions" (rule III).

576. With regard to injuries caused in case of mob, riot, insurrection or civil war, rule VII provides that the State is not responsible "unless it has not sought to prevent the injurious acts with the diligence proper to employ normally in such circumstances, or unless it has not acted with like diligence against these acts or unless it does not apply to foreigners the same measures of protection as to nationals". So far as "denial of justice" is concerned, rule VI makes the State responsible "if the procedure or the judgement is manifestly unjust, especially if they have been inspired by ill-will towards foreigners, as such, or as citizens of a particular State".

"(a) If the act is criminal under the law of the State concerned, or

"(b) If the act is generally recognized as criminal by the principal legal systems of the world".

<sup>946</sup> See *Yearbook ... 1969*, vol. II, p. 141, document A/CN.4/217 and Add.1, annex II.

<sup>947</sup> See *Yearbook ... 1956*, vol. II, p. 227, document A/CN.4/96, annex 8.

577. The 1929 Harvard Law School draft convention on "Responsibility of States for damage done in their territory to the person or property of foreigners"<sup>948</sup> is essentially based on the concept of "due diligence". Thus, article 10 provides that:

A State is responsible if an injury to an alien results from its failure to exercise due diligence to prevent the injury, if local remedies have been exhausted without adequate redress for such failure.

Failure to exercise or use "due diligence" or "diligence" to prevent the injury is likewise the criterion embodied in articles 11, 12 and 14 of the draft governing the responsibility of the State in cases of injuries resulting from acts of individuals, of mob violence, of insurgents or of another State on its territory.

578. The "diligence required" may vary, according to article 10, "with the private or public character of the alien and the circumstances of the case". The commentary on the article<sup>949</sup> points out that the phrase "due diligence"—a standard and not a definition—implies State jurisdiction to take measures of prevention "as well as an opportunity for the State to act, consequent upon knowledge of impending injury or circumstances which would justify an expectation of probable injury". And later on, it explains that when "as often happens, the attack upon a public minister or consul is spontaneous and clearly occurs without any negligence on the part of the Government, it is hard to find a legal basis for any modification of the usual rule that a State is responsible only for some fault or delinquency of its own. Reparation has sometimes been made in such cases as a result of political considerations"<sup>950</sup>.

579. The commentaries on articles 11 (acts of individuals and mob violence), 12 (acts of insurgents) and 14 (acts of another State) also contain certain passages relevant to the subject-matter of the present paper. Thus, in the commentary on article 11, it is stated:

... Although a denial of justice is, in mob cases as in others, a ground for State responsibility, there is less willingness by claimant Governments to await the resort to and the exhaustion of local remedies when an attack has been directed against their nationals because of their nationality, than when the assault is a fortuitous event directed against a single alien without special reference to his particular nationality. The fact that in many cases mob violence is shocking and stirs the emotions, has led States to pay indemnities without too close an analysis of the existence of responsibility. By the law of many countries and of several States of

<sup>948</sup> *Ibid.*, pp. 229–230, document A/CN.4/96, annex 9.

<sup>949</sup> For the commentaries on the articles, see Harvard Law School, *Research in International Law, Drafts of Conventions prepared in anticipation of the First Conference on the Codification of International Law (The Hague, 1930)*, in *Supplement to the American Journal of International Law* (Washington, D.C.), vol. 23 (special issue, April 1929) pp. 140 *et seq.* Commentary on article 10 on pp. 187–188.

<sup>950</sup> The commentary distinguishes between "responsibility of the State for failure to use diligence to prevent injuries to aliens" and "responsibility of the State for failure to use diligence to bring offenders to justice". The latter is viewed as a responsibility for denial of justice, while the former is considered as arising out of the State's duty to exercise the function of prevention.



the United States, communities and cities assume the obligation to indemnify, without proof of governmental fault, the victims of mob violence or riots.

... aside from any question of delinquency upon the part of the authorities, it may be said that in most cases of injuries inflicted upon aliens during riots, indemnities have been paid as a matter of grace or humanity, either because of the fact that the fury of the mob was directed against aliens as such, or against the subjects of a certain foreign Power ...

The State is clearly responsible where it fails to show due diligence in preventing or suppressing the riot, or where the circumstances indicate an insufficiency of protective measures or a complicity of government officers or agents in the disorder.

580. With regard to insurgents, the commentary on article 12 mentions that in principle the State is not responsible for injuries caused to aliens by the insurgents "when they escape governmental control" and the commentary on article 14 that "where the forces of another State temporarily displace the local government, against that government's will, the principal condition of responsibility is removed. It has temporarily and *pro tanto* no power in its own territory".

581. Finally article 4 of the draft provides that:

A State has a duty to maintain governmental organization adequate, under normal conditions, for the performance of its obligations under international law and treaties. In the event of emergencies temporarily disarranging its governmental organization, a State has a duty to use the means at its disposal for the performance of those obligations.

The corresponding commentary explains that:

... in every State, temporary abnormal conditions may result in the dislocation of the governmental organization, and such possibility is to be taken into account in determining whether responsibility exists in a given case. Even in abnormal times, however, a State has a duty to use the means at its disposal for the protection of aliens, and a failure to perform this duty may result in its becoming responsible to another State injured in consequence thereof. The term "means at its disposal" is employed because it is desired to emphasize the instrumentalities of government that may be available for use. The term is thus different from the term "due diligence" used in article 10, which has reference to the efficiency and diligence with which the instrumentalities of government are employed.

... The present practice often tends to penalize a State for its weakness by requiring practically a guarantee of the continuity of normal governmental machinery. Such continuity is not always possible, as in the case of civil wars and local insurrections. It would seem that a State should not be held to duties which it cannot perform, provided the disability is temporary only and due to exceptional causes or circumstances.

582. In so far as the drafts referred to above<sup>951</sup> take into account "fault", "wilfulness", "negligence" or "due diligence", acts or omissions prompted by a situation of *force majeure* or by a fortuitous event, (namely by a kind of conduct in which by definition "fault", "wilfulness", "negligence" or "lack of due diligence" is absent) will not give rise, under those drafts, to the international responsibility of the State. Such an approach renders unnecessary the insertion in the draft of specific provisions on *force majeure* and fortuitous event as circumstances precluding wrongfulness.

<sup>951</sup> In paras. 574, 575 and 577.

**(d) Drafts referring to the notions of "fault" or "due care" with regard to "omissions"**

583. The *draft treaty concerning the responsibility of a State for internationally illegal acts, prepared by Professor Strupp in 1927*<sup>952</sup> distinguishes between "actions" and "omissions". "Fault" is expressly mentioned in connexion with "omissions" only. This is reflected in article 1 as follows:

A State is responsible to other States for the acts of persons or groups whom it employs for the accomplishment of its purposes (its "organs"), in so far as these acts conflict with the duties which arise out of the State's international legal relations with the injured State.

If the act consists of an omission, the employing State is responsible only if it is chargeable with fault.

584. Article 3 specifies that for the acts of private persons, including acts of persons or groups on the occasion of riots, insurrections, civil war and similar cases, a State is responsible only according to the measure of article 1, paragraph 2. And article 6 states that a State is responsible for its courts only if they have been guilty of an "intentional" denial or delay of justice.

585. A distinction between "actions" and "omissions" is also made in the *draft convention on the responsibility of States for internationally wrongful acts, prepared by Professor Roth in 1932*.<sup>953</sup> Failure to exercise "due care" is the criterion followed for "omissions". The corresponding provisions read as follows:

*Article 1*

A State is responsible for the acts contrary to international law of any individuals whom or corporations which it entrusts with the performance of public functions, provided that such acts are within the general scope of their jurisdiction.

*Article 3*

The State is liable for omissions only if it has failed to exercise such care as should, with due regard to the circumstances, be expected of a member of the international community.

586. Article 6 of the draft points out that in the event of domestic disturbances, the State is liable "only" according to the measure of articles 1 to 4. And article 7 states that a State is liable for its judicial organs "only" in case of "perversion" or "denial of justice".

587. In the light of the wording of those provisions, it appears that, under the two drafts referred to in this subsection, "*force majeure*" and "fortuitous event" would preclude wrongfulness in case of "omissions". The Strupp draft recognizes expressly such a possibility in its article 4, according to which:

In the case of an omission, a State may release itself from responsibility by proving that it has not acted wilfully or has not negligently failed to observe the necessary care.

<sup>952</sup> See *Yearbook ... 1969*, vol. II, pp. 151-152, document A/CN.4/217 and Add.1, annex IX.

<sup>953</sup> *Ibid.*, p. 152, document A/CN.4/217 and Add.1, annex X.

It should be noted, however, that under that rule the burden of proof of *force majeure* or fortuitous event rests upon the respondent State. Neither of those two drafts contains, however, express provisions on the basis of which a plea of *force majeure* or fortuitous event could be invoked for "actions".

(e) Other drafts

588. The draft convention on the responsibility of States for injuries caused in their territory to the person or property of aliens, prepared by the *Deutsche Gesellschaft für Völkerrecht (German International Law Association)* in 1930<sup>954</sup> follows very strictly the principle of "objective responsibility". Article 1, paragraphs 1 and 2, of the draft reads as follows:

1. Every State is responsible to other States for injury caused in its territory to the person or property of aliens as a consequence of the violation by that State of any of its obligations towards the other State under international law.

2. The violation of an obligation under international law may consist of an omission if action or a specific act would, in the circumstances, have been an obligation under international law.

589. No specific provision is contained in the draft on circumstances precluding wrongfulness. It should

be noted, however, that, with regard to "omissions", paragraph 2 of article 1 quoted above refers to "circumstances" and that article 5 relating to injury caused by acts of private persons specifies that in such cases the State is responsible only according to the measure of article 1, paragraph 2. Moreover, article 6, paragraphs 1 and 2, bases State responsibility for injuries caused on the occasion of riots, insurrections, civil war or other similar cases on the principle of failure "to apply such diligent care as the circumstances require". Furthermore, the rules in article 2 on the obligation of the State to protect the life, freedom and property of aliens in its territory and of article 3 on denial of justice contain expressions such as "manifestly unnecessary", "lawful cause", "due cause", "unnecessary hardships", "reasons of the general welfare", "compelling reasons of public welfare", "failure to do all things as appropriate", "necessary in the circumstances", "unduly", "conscientious judicial determination", "malice toward aliens"; in particular, article 2, paragraph 2 (d), states that payments of interest and repayments of principal in cases of obligations of indebtedness of a State toward an alien may be suspended or modified only "in the event of financial necessity". All those expressions, or at least some of them, may eventually provide a basis for pleas of *force majeure* or fortuitous event in the process of establishing whether or not a violation of the rules concerned has been committed.

<sup>954</sup> *Ibid.*, pp. 149–151, annex VIII.



# SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

[Agenda item 3]

DOCUMENT A/CN.4/313

Tenth report on succession of States in respect of matters other than treaties

by Mr. Mohammed Bedjaoui, Special Rapporteur

*Draft articles, with commentaries, on succession to State debts (continued\*)*

[Original: French]  
[26 May 1978]

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\* For the previous draft articles on succession to State debts submitted by the Special Rapporteur, see the ninth report (*Yearbook* ... 1977, vol. II (Part One), p. 45, document A/CN.4/301 and Add.1).

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#### ABBREVIATION

IBRD    International Bank for Reconstruction and Development

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#### EXPLANATORY NOTE: ITALICS IN QUOTATIONS

An asterisk inserted in a quotation indicates that, in the passage immediately preceding the asterisk, the italics have been supplied by the Special Rapporteur.

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### Introduction

1. At the twenty-ninth session of the International Law Commission, the Special Rapporteur submitted his ninth report,<sup>1</sup> in which he discussed the problems raised by succession to State debts and proposed a set of articles for solving them, thus complying with the guidelines laid down by the General Assembly in its resolutions 3315 (XXIX), 3495 (XXX) and 31/97.

2. After having nearly completed its consideration of the report, the International Law Commission, provisionally adopted the following articles, which form part of part II of the draft articles on succession of States in respect of matters other than treaties:

#### *Article 18. State debt*

For the purposes of the articles in the present Part, "State debt" means any [international] financial obligation which, at the date of the succession of States, is chargeable to the State.

#### *Article 19. Obligations of the successor State in respect of State debts passing to it*

A succession of States entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State in accordance with the provisions of the articles in the present part.

#### *Article 20. Effects of the passing of State debts with regard to creditors*

1. The succession of States does not as such affect the rights and obligations of creditors.

2. An agreement between predecessor and successor States or, as the case may be, between successor States concerning the passing of the State debts of the predecessor State cannot be invoked by the predecessor or the successor State or States, as the case may be, against a creditor third State or international organization [or against a third State which represents a creditor] unless:

#### PART II

#### SUCCESSION OF STATES TO STATE DEBTS

##### SECTION I. GENERAL PROVISIONS

#### *Article 17. Scope of the articles in the present Part*

The articles in the present Part apply to the effects of succession of States in respect of State debts.

<sup>1</sup>*Yearbook ... 1977*, vol. II (Part One), p. 45, document A/CN.4/301 and Add.1.

(a) the agreement has been accepted by that third State or international organization; or

(b) the consequences of that agreement are in accordance with the other applicable rules of the articles in the present Part.

## SECTION 2. PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

### *Article 21. Transfer of part of the territory of a State*

1. When a part of the territory of a State is transferred by that State to another State, the passing of the State debt of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

2. In the absence of an agreement, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt.

### *Article 22. Newly independent States*

When the successor State is a newly independent State:

1. No State debt of the predecessor State shall pass to the newly independent State, unless an agreement between the newly independent State and the predecessor State provides otherwise in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

2. The provisions of the agreement referred to in the preceding paragraph should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor should their implementation endanger the fundamental economic equilibria of the newly independent State.

3. Thus, the International Law Commission adopted various articles containing general provisions and others containing specific provisions relating to each type of succession of States. Among the provisions relating to particular types of succession, draft article 21 concerns the case of the transfer of part of the territory of a State, while draft article 22

relates to newly independent States. In order to complete its work on this part, the Commission therefore still has to consider the treatment of State debts in the case of the other three types of succession of States, namely, the uniting of States, the separation of one or more parts of a State and the dissolution of a State.

4. With regard to the uniting of States, the Special Rapporteur submitted a report<sup>2</sup> in which he proposed a draft article W in the following terms:

### *Article W. Treatment of State debts in cases of uniting of States*

**On the uniting of two or more States in one State, the successor State thus formed shall not succeed to the debts of the constituent States unless:**

(a) **The constituent States have otherwise agreed; or**

(b) **The uniting of States has given rise to a unitary State.**

At its thirtieth session, the Commission is expected to consider that report, which it did not have time to study at its previous session, and to take a decision on draft article W, which might become article 23.

5. Accordingly, the specific purpose of the present report is to propose draft articles on the treatment of State debts in cases of separation of one or more parts of a State and of the dissolution of a State. The Special Rapporteur intends to submit, as Part III of his draft articles, a provision relating to the procedure for the peaceful settlement of disputes that might arise in the context of a succession of States. All that would then remain to be considered at the Commission's thirty-first session would be the possibility of including, in compliance with the wish expressed by the Commission, some articles concerning succession in respect of State archives, to complete the set of draft articles on succession to State property and State debts.

<sup>2</sup> *Ibid.*, p. 107 *et seq.*, document A/CN.4/301 and Add.1, chap. VI.

## CHAPTER I

### Uniting of States

[See *Yearbook ... 1977*, vol. II (Part One), pp. 107 *et seq.*, document A/CN.4/301 and Add.1, chap. VI]

## CHAPTER II

### Separation of a part or parts of the territory of a State

6. A typological problem still requires some explanations and a choice will no doubt have to be made. In the draft articles on succession of States in respect of treaties<sup>3</sup> which were submitted to the United Na-

<sup>3</sup> *Yearbook ... 1974*, vol. II (Part One), pp. 174 *et seq.*, document A/9610/Rev.1, chap. II, sect. D.

tions Conference on the Succession of States in respect of Treaties, the International Law Commission included a part IV dealing with the problems grouped under the heading "Uniting and separation of States". The relevant provisions concerned the cases of (a) *the uniting of States*, defined as the case of "two or more States [which] unite and so form one

successor State" (article 30); and (b) *the separation of a State*, defined as the case of "a part or parts of the territory of a State [which] separate to form one or more States, whether or not the predecessor State continues to exist" (article 33).<sup>4</sup> Thus, the draft submitted to the Conference dealt, firstly, with the uniting of States and, secondly, with the separation of a State, without, in the latter case, making a distinction according to whether or not the predecessor State continues to exist.<sup>5</sup>

7. The draft articles on succession of States in respect of matters other than treaties,<sup>6</sup> on the other hand, in Part I entitled "Succession to State property", relate to more precisely defined situations: (a) *the uniting of States*, defined as the case of "two or more States [which] unite and thus form a successor State" (article 14); (b) *the separation of part or parts of the territory of a State*, which occurs "when a part or parts of the territory of a State separate from that State and form a State" (article 15), it being understood that the predecessor State *continues to exist* after such separation; and (c) *the dissolution of a State*, which occurs "when a predecessor State dissolves and *disappears*\* and the parts of its territory form two or more States" (article 16).

8. The Commission explained its choices in these words:

(4) In its work of codification and progressive development of the law relating to succession of States in respect of treaties and to succession of States in respect of matters other than treaties, the Commission has constantly borne in mind the desirability of maintaining some degree of parallelism between the two sets of draft articles and in particular, as far as possible, the use of common definitions and common basic principles, without thereby ignoring or dismissing the characteristic features that distinguish the two topics from one another. The Commission has considered that, so far as is possible without distorting or unnecessarily hindering its work, the parallelism between the two sets of draft articles should be regarded as a desirable objective. Nevertheless, as regards the present draft, the required flexibility should be allowed in order to adopt such texts as best suit the purposes of the codification, in an autonomous draft, of the rules of international law governing specifically succession of States in respect of matters other than treaties and, more particularly, succession to State property.

(5) In the light of the foregoing, the Commission, while reaffirming its position that for the purpose of codifying the modern law of succession of States in respect of treaties it was sufficient, as it did in the 1974 draft, to arrange the cases of succession of States under the three broad categories ...,<sup>7</sup> nevertheless found that, in view of the characteristics and requirements peculiar to the subject of succession of States in respect of matters other than treaties, particularly as regards succession to State property, some further

<sup>4</sup> See also draft article 34 relating to the "separation of any part of the territory of a State [when] the predecessor State continues to exist".

<sup>5</sup> This is the situation expressly provided for in article 33, applicable to two cases of survival and also of disappearance of the predecessor State. The subsequent article 34, however, dealt with the specific case where any part of a State's territory is separated and the predecessor State continues to exist.

<sup>6</sup> *Yearbook ... 1977*, vol. II (Part Two), pp. 56 *et seq.*, document A/32/10, chap. III, sect. B.1.

<sup>7</sup> These are: (a) succession in respect of part of the territory; (b) newly independent States; (c) uniting and separation of States.

precision in the choice of types of succession was necessary for the purpose of the draft now being prepared. ... as regards the *uniting and separation of States*, the Commission, while following the pattern of dealing in separate articles with those two types of succession, nevertheless found it appropriate to distinguish between the "separation of part or parts of the territory of a State", which is the subject of article 15, and the "dissolution of a State", which forms the subject of article 16.<sup>8</sup>

9. For the sake of the parallelism, clarity and, indeed, internal consistency of the set of draft articles on succession in respect of State property and State debts, the Special Rapporteur intends, in dealing with succession to debts, to follow the same typology as that chosen for succession to property. This chapter will therefore deal with the separation of part or parts of the territory of a State where that State continues to exist after such separation.

### A. Practice of States

10. In the present context, reference may be made to some relevant examples taken from the practice of States. It should be noted, first of all, that, prior to the establishment of the United Nations, most examples of secession were to be found among cases of the "secession of colonies", because colonies were considered, through various legal and political fictions, as forming "an integral part of the metropolitan country". These cases are therefore not relevant to the situation being considered here, that of the separation of parts of a State, since, according to contemporary international law, these are newly independent States resulting from decolonization under the Charter of the United Nations.

Since the establishment of the United Nations, there have been only three cases of secession which were not cases of decolonization: the separation of Pakistan from India, the withdrawal of Singapore from Malaysia and the secession of Bangladesh. One writer reports that, in the case of Pakistan, an Expert Committee was appointed on 18 June 1947 to consider the problem of the apportionment of the property of British India; the presumption guiding its deliberations was that "India would remain a constant international person and Pakistan would constitute a successor State".<sup>9</sup>

Apart from these cases, some of which were more or less concomitants of the process of decolonization, reference may be made to the case of the formation of the Irish Free State, which preceded the establishment of the United Nations.

#### 1. ESTABLISHMENT OF THE IRISH FREE STATE (1922)

11. By a treaty dated 6 December 1921, Ireland obtained from the United Kingdom the status of a

<sup>8</sup> *Yearbook ... 1976*, vol. II (Part Two), p. 129, document A/31/10, chap. IV, sect. B.2, paras. 4 and 5 of the introductory commentary to section 2 of part I of the draft.

<sup>9</sup> D. P. O'Connell, *State Succession in Municipal and International Law*, vol I (Cambridge University Press, 1967), p. 220.



Dominion and became the Irish Free State. The Treaty apportioned debts between the predecessor State and the successor State in the following terms:

The Irish Free State shall assume liability for the service of the Public Debt of the United Kingdom as existing at the date hereof and towards the payment of war pensions as existing at that date in such proportion as may be *fair and equitable*,\* having regard to any *just claims*\* on the part of Ireland by way of set-off or counter-claim, the amount of such sums being determined in default of agreement by the arbitration of one or more independent persons being citizens of the British Empire.<sup>10</sup>

12. The Treaty referred to illustrates strikingly the primacy of the *principle of equity* in the apportionment of debts. In very terse language, article V states the principle of equity, the means of implementing it, the acceptance, precisely in the name of equity, of any claims or counter-claims on the part of Ireland and the establishment of a procedure for the peaceful settlement of disputes.

## 2. THE SECESSION OF SINGAPORE (1965)

13. Singapore became part of the Federation of Malaya under an agreement dated 9 July 1963. Paragraph 1 of section 76 of the "Malaysia Bill"<sup>11</sup> annexed to the Agreement, entitled "Succession to rights, liabilities and obligations", reads as follows:

All rights, liabilities and obligations relating to any matter which was immediately before Malaysia Day the responsibility of the government of a Borneo State or of Singapore, but which on that day becomes the responsibility of the Federal Government, shall on that day devolve upon the Federation, unless otherwise agreed between the Federal Government and the government of the State.<sup>12</sup>

That provision thus operated a transfer of rights, but also of obligations, of the States to the Federation, except as otherwise agreed by the Governments concerned.

14. By contrast, there seems to have been a practically mechanical return to the *status quo ante* when Singapore withdrew from the Federation and achieved independence on 9 August 1965. Article VIII of the "Agreement relating to the separation of Singapore from Malaysia as an independent and sovereign State", signed at Kuala Lumpur on 7 August 1965, provides that:

With regard to any agreement entered into between the Government of Singapore and any other country or corporate body has been guaranteed by the Government of Malaysia, the Government of Singapore hereby undertakes to negotiate with such country or corporate body to enter into a fresh agreement releasing the Government of Malaysia of its liabilities and obligations under the said guarantee, and the Government of Singapore hereby undertakes to indemnify the Government of Malaysia

<sup>10</sup> Article V of the Treaty of 6 December 1921 between Great Britain and Ireland (League of Nations, *Treaty Series*, vol. XXVI, p. 10).

<sup>11</sup> Entered into force on 16 September 1963, pursuant to article II of the Agreement of 9 July 1963, as amended by the Agreement of 28 August 1963.

<sup>12</sup> United Nations, *Treaty Series*, vol. 750, p. 60.

fully for any liabilities, obligations or damage which it may suffer as a result of the said guarantee.<sup>13</sup>

15. The Constitution of Malaysia (Singapore Amendment) Act, 1965, also contains some provisions relating to "succession to liabilities and obligations", including the following paragraph:

9. All property, movable and immovable, and rights, liabilities and obligations which before Malaysia Day belonged to or were the responsibility of the Government of Singapore and which on that day or after became the property of or the responsibility of the Government of Malaysia shall on Singapore Day revert to and vest in or devolve upon and become once again the property of or the responsibility of Singapore.<sup>14</sup>

16. This is a case of secession which is akin to the dissolution of a union or of a federation of States. The federal or confederal nature of the grouping, which to some extent tended to preserve the identity of the components, and the short life-span of the union, which did not have time to achieve a more far-reaching integration, probably contributed to the nearly total and practically automatic return to the *status quo ante* in respect of property and of debts. But it is perfectly clear that cases of this kind are not typical.

## 3. THE SECESSION OF BANGLADESH (1973)

17. The apportionment between Bangladesh and Pakistan of the State debts contracted by Pakistan before the secession of Bangladesh does not seem to have been settled at the time of writing. The problem remains pending, particularly since the negotiations between the two States conducted at Dacca from 27 to 29 June 1974 ended in failure. In this connexion, one writer has stated that "Bangladesh claimed 56 per cent of all common property, while at the same time remaining very reticent as regards the apportionment of existing debts, a problem which apparently it did not want to tackle until after settlement of the apportionment of assets—an approach which Pakistan is said to have refused".<sup>15</sup>

18. As the Special Rapporteur indicated in his eighth report, however, the Government of Pakistan agreed to accept continued responsibility, after 1 July 1973 and up to 30 June 1974, for the debt of the former Pakistan State.<sup>16</sup> It was during that one-year period that the two States were to have conducted negotiations with a view to apportioning the State debt; these negotiations were abortive.<sup>17</sup>

<sup>13</sup> *Ibid.*, vol. 563, p. 89.

<sup>14</sup> Annex B to the Agreement of 7 August 1965 (*ibid.*, p. 98).

<sup>15</sup> C. Rousseau, *Droit international public*, vol. III (Paris, Sirey, 1977), p. 454.

<sup>16</sup> See *Yearbook ... 1976*, vol. II (Part One), p. 109, document A/CN.4/292, chap. III, art. 17, para. 59 of the commentary.

<sup>17</sup> See the reply of the French Minister of Economic Affairs and Finance to a written question from a deputy, Mr. Raymond Offroy, in: France, *Journal Officiel de la République française, Débats parlementaires: Assemblée nationale* (Paris), 8 September 1973, No. 62 A.N., pp. 3672-3673, and *Annuaire Français de droit international*, 1973 (Paris), vol. XIX (1974), p. 1074.

## B. Comments and proposals

19. As can be gathered from the foregoing passages, the practice of States in the case of separation of a part or parts of a State is not very abundant, nor is it easy to obtain information about it. That being so, one possible approach would be, of course, to treat the agreement between the parties concerned as the fundamental basis of the rule to be established, particularly since the agreement is, in any case, essential and since the rules which the Commission is trying to work out are not meant to be more than residual in nature. By analogy with the provisions in article 21,<sup>18</sup> which relate to the treatment of State debts in the case of the transfer of part of the territory of a State, the prospective provision would then state that, in the case of the separation of a part or parts of the territory of a State, the passing of the State debt of the predecessor State to the successor State is settled by agreement between the two States. Only in the absence of agreement would the principle of equity be relied upon.

20. Such a rule, modelled on that in article 21, would, however, disregard the essential differences that distinguish the case of the separation of part or parts of the territory of a State from the case of the transfer of a part of a State's territory. In this respect, the Commission has already expressed a clear preference by deciding to treat the case of the transfer of a part of a State's territory as involving usually a transfer of a relatively small and relatively unimportant territory, according to theoretically peaceful procedures and, in principle, by agreement between the ceding State and the beneficiary State.

The case of the separation of a part or parts of the territory of a State is very different. It involves a territorial secession which should be regarded as being quite important in itself, for its *de facto* consequence is the establishment of a State. In such a case, it is far from certain that the secession always takes place by agreement. Indeed, there is a strong presumption that there is no agreement. The example of the secession of Bangladesh is typical of such a situation. Accordingly, it would be quite unrealistic to make the agreement the essential basis for the rule to be formulated, for, in such a case, the rule would probably be unworkable.

21. It seems more to the point, therefore, to refer to the principle of equity, as applied hitherto in the rest of the draft articles. It is a basic element of any settlement. If this principle is followed, then, *ipso facto* and in all fairness, it will be necessary to envisage a certain unavoidable parallelism between the earlier rules concerning the passing of State property and the future rules concerning succession to State debts. In this connexion, the provisions in article 15, which deal with the passing of State property in the case of

the separation of a part or parts of a State's territory may, to a large extent, serve as a model. Some correlation would have to be established between State debts and the property rights and interests which pass to the successor State in connexion with the State debts. The paramount criterion should be the observance of the principle of equity, which remains the foundation of the entire structure and which should make it possible to take account of any compensation, any "just and equitable claim" or similar counter-claim, in short to establish an essential balance in the apportionment of debts between the two States concerned.

22. A provision along the following lines might therefore be proposed:

"1. If a part or parts of the territory of a State should separate from that State and form a State, then, unless the predecessor State and the successor State agree otherwise, an equitable proportion of the State debts of the predecessor State shall pass to the successor State, taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt."

The agreement between the parties is in the most appropriate place in this formulation.

23. It will be remembered that the Commission decided that, for the purposes of the codification of the rules of international law relating to succession of States in respect of matters other than treaties, it was appropriate to make a distinction between, and to deal separately with, three cases which, in the 1974 draft on succession of States in respect of treaties,<sup>19</sup> formed the subject of a single provision, namely, article 14; the three cases are: (a) the case where part of the territory of a State is transferred by that State to another State (art. 12); (b) the case where a part of the territory of a State separates from that State and unites with another State (art. 15, para. 2); (c) the case where a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations (art. 13, para. 5).

24. In the Commission's view, the case of the transfer of territory from one State to another is one where the fact of the replacement of the predecessor State by the successor State in the responsibility for the international relations of the part of the territory concerned does not presuppose the consultation of the population of that part of territory, in view of the minor political, economic, strategic, etc. importance of that part of territory or the fact that it is scarcely inhabited, if at all. Such a case was clearly distinguished from that dealt with in article 15, paragraph 2, in which a part of the territory of a State separates from that State and unites with another State. In the case of such separation, as opposed to

<sup>18</sup> For the text of the articles adopted so far by the Commission, see *Yearbook ... 1977*, vol. II (Part Two), pp. 56 *et seq.*, document A/32/10, chap. III, sect. B.1.

<sup>19</sup> For reference, see foot-note 3 above.

the case of the transfer of a part of territory the territorial change presupposes the expression of a conforming will on the part of the population of the separating part of territory as a consequence of the geographical size and large number of inhabitants of that part of territory or of its political, economic or strategic importance.

25. It was in the light of such considerations that the Commission extended the scope of the rule embodied in article 15 to the case where a part of a State's territory separates from that State and unites with another existing State. Much the same approach should be followed with respect to the passing of State debts in the draft article now under consideration. Accordingly, the Commission might incline to the view that the provisions suggested above for the passing of State debts in the case of separation of a

part or parts of the territory of a State should apply also in the case where part of a State's territory separates from that State and unites with another State.

26. In the light of the foregoing remarks, the Special Rapporteur proposes the following draft article:

*Article 24. Separation of a part or parts of the territory of a State*

1. If a part or parts of the territory of a State should separate from that State and form a State, then, unless the predecessor State and the successor State agree otherwise, an equitable proportion of the State debts of the predecessor State shall pass to the successor State, taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt.

2. The provisions of paragraph 1 shall apply in the case where a part of the territory of a State separates from that State and unites with another State.

## CHAPTER III

### Dissolution of a State

27. The situation considered under this heading is that of the total disappearance of the predecessor State as a result of its breaking up or dismemberment. None of the parts of its territory constituted into as many separate States can be regarded, legally, as the continuation of the predecessor State. One example of this case is that of the total dismemberment of a unitary State. Another, and more common, example is that of the dissolution of a federal or confederal State, where the union, federation or confederation is replaced by its original component States.

28. Historical precedents that may be cited for both these cases of dissolution of a State are: the dissolution of Great Colombia (1829-1831); the separation of Belgium and Holland (1830); the dissolution of the union of Norway and Sweden (1905); the disappearance of the Austro-Hungarian Empire (1919); the break-up of the Danish-Icelandic union (1944); the termination of the Federation of Mali (1960); the dissolution of the United Arab Republic (1960); and the dissolution of the Federation of Rhodesia and Nyasaland (1963).

The purpose of the present study is to determine the treatment of State debts after the dissolution of a unitary State or a union. For this purpose, dissolution may be defined as the reverse of the process of the uniting of States.

#### A. Practice of States

##### I. THE DISSOLUTION OF GREAT COLOMBIA (1831)

29. Great Colombia, formed in 1821 by the union of New Granada, Venezuela and Ecuador, was not to be long-lived. Within about ten years, internal strug-

gles put an end to the union, whose dissolution was totally consummated in 1831.<sup>20</sup>

30. The successor States agreed to assume responsibility for the debts of the union. New Granada and Ecuador first established the principle in the Treaty of Peace and Friendship between the States of New Granada and Ecuador, concluded at Pasto on 8 December 1832. Article VII of the Treaty provides as follows:

It has been agreed, and is hereby agreed, in the most solemn manner, and under the Regulations of the Laws of both States, that New Granada and Ecuador shall pay such share of the Debts, Domestic and Foreign, as may proportionably belong to them as integral parts which they formed, of the Republic of Colombia, which Republic recognized the said debts *in solidum*. Moreover, each State agrees to answer for the amount of which it may have disposed belonging to the said Republic.<sup>21</sup>

31. Then there was the Convention between New Granada and Venezuela relative to the debt of the late Republic of Colombia, signed at Bogotá on 23 December 1834, to which Ecuador subsequently acceded on 17 April 1837.<sup>22</sup> These last two instruments indicate that the successor States were to apportion the debts of Great Colombia among themselves in the following proportions: New Granada, 50 per cent; Venezuela, 28.5 per cent; and Ecuador, 21.5 per cent.<sup>23</sup>

<sup>20</sup> Cf. V.-L. Tapie, *Histoire de l'Amérique latine au XIX<sup>e</sup> siècle* (Paris, Montaigne, 1945), See, in particular, the discussion of the break-up of Great Colombia, pp. 57-60.

<sup>21</sup> *British and Foreign State Papers, 1832-1833* (London, Ridgway, 1836), vol. XX, p. 1209.

<sup>22</sup> *Ibid.*, 1834-1835 (London, Ridgway, 1852), vol. XXIII, p. 1342; also, E. H. Feilchenfeld, *Public Debts and State Succession* (New York, Macmillan, 1931) pp. 296-298 (particularly p. 296, where the relevant articles of the Convention are quoted).

<sup>23</sup> A. Sánchez de Bustamante y Sirvén, *Droit international public*, translation in French by P. Goulé (Paris, Sirey (1936), vol. III,

32. Almost 50 years after their apportionment among the three successor States, the debts of Great Colombia gave rise to two arbitral awards made by the Mixed Commission of Caracas, set up between Great Britain and Venezuela under an agreement of 21 September 1868. These were the awards made in the two famous *Sarah Campbell* and *W. Ackers-Cage* cases,<sup>24</sup> in which two claimants – Alexander Campbell (later, his widow, Sarah Campbell) and W. Ackers-Cage – sought to obtain from Venezuela payment of a debt owing to them by Great Colombia. Sturup, the referee, in his award of 1 October 1869, held that “the two claims should be paid by the Republic. However, since they both form part of the country’s external debt, it would be unjust\* to require that they be paid in full”.<sup>25</sup>

33. In their commentary on this award, de Lapradelle and Politis consider that “the responsibility of Venezuela for the debts of the former Republic of Colombia, from which it had originated, was not and could not be contested ...” because, in the opinion of the authors (citing Bonfils and Fauchille), it can be regarded as a rule of international law that “where a State ceases to exist by breaking up or by dividing into several new States, the new States should each bear, in an equitable proportion,\* a share of the debts of the original State as a whole”.<sup>26</sup> Charles Rousseau takes the same view and adds pertinently that “the referee Sturup simply took account of the resources of the successor State in imposing an equitable reduction of the amount of the claims”.<sup>27</sup> From the point of view of effective codification and progressive development in this field, allowance must certainly be made for the financial situation of the successor State.

## 2. THE BREAK-UP OF THE NETHERLANDS (1830-1839)

34. The break-up of the Belgian-Dutch State in 1830 has been described as “one of the oddest cases because of the numerous negotiations to which it gave rise and the statements made in the course of those negotiations”.<sup>28</sup> What came to be known as “the Belgian-Dutch question” had necessitated the intervention of the five Powers of the Holy Alliance, in the form of a conference which opened in London in 1830 and which culminated only in 1839 in the signing of the Treaty of London on 19 April of that year.<sup>29</sup>

(Foot-note 23 continued)

p. 337; H. Accioly, *Traité de droit international public*, translation into French by P. Goulé (Paris, Sirey, 1940), vol. I, p. 199; O’Connell, *op. cit.* p. 338.

<sup>24</sup> A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux*, vol. II (Paris, Pedone, 1923), pp. 552–556.

<sup>25</sup> *Ibid.*, pp. 554 and 555.

<sup>26</sup> *Ibid.*, p. 555.

<sup>27</sup> Rousseau, *op. cit.* p. 431.

<sup>28</sup> Sánchez de Bustamante y Sirvén, *op. cit.*, p. 336.

<sup>29</sup> Treaty made and signed in London on 19 April 1839 between Belgium and Holland, relative to the separation of their respective territories. See *British and Foreign State Papers, 1838–1839* (London, Harrison, 1856), vol. XXVII, p. 1000. The five Powers of the

For a better understanding of the treatment of the debts of the Netherlands upon the dismemberment of that State, it seems useful first to describe how the “States” concerned dealt with this question when they joined together and then to see how the succession to the debts of the Netherlands was settled upon that country’s dismemberment in 1830.

### (a) State debts during the period of the Belgian-Dutch union

35. Belgium and the Netherlands were united by an Act of 21 July 1814.<sup>30</sup> Article 1 of the Act states that

This union shall be intimate and complete so that the two countries form but one single State,\* governed by the Constitution already established in Holland, which will be modified by agreement in accordance with the new circumstances.

In view of the “intimate and complete” nature of the union thus achieved, article VI of the Act quite naturally concluded that:

Since the burdens as well as the benefits are to be common, debts contracted up to the time of the union by the Dutch Provinces on the one hand and by the Belgian Provinces on the other, shall be borne by the General Treasury of the Netherlands.

The Act of 21 July 1814 was later annexed to the General Act of the Congress of Vienna<sup>31</sup> and the article VI cited was invoked on a number of occasions to provide guidance for the apportionment of the debts between Holland and Belgium.

### (b) The London Conference for the “settlement of the affairs of Holland and Belgium” (1830-1839)<sup>32</sup>

36. During the nine years it took to settle the problems created by the dissolution of the union of Belgium and Holland, no fewer than 15 diplomatic documents had to be prepared before the claims regarding the debts of the Kingdom of the Netherlands could be settled. There is little point in recapitulating in detail the tortuous course of these proceedings. The passages which follow describe only the essential points, specifically citing a few of the relevant texts and the final Treaty of London of 19 April 1839.

#### (i) The “proposals for settlement”

It was on the initiative of the five Powers of the Holy Alliance that the various draft texts which led to the final settlement were prepared.

#### a. The Twelfth Protocol of the London Conference, dated 27 January 1831<sup>33</sup>

Holy Alliance were Austria, France, Great Britain, Prussia and Russia.

<sup>30</sup> *Acte signé par le Secrétaire d’Etat de S.A.R. le Prince des Pays-Bas pour l’acceptation de la souveraineté des provinces belges sur la base convenue* (The Hague, 21 July 1814) (see *British and Foreign State Papers, 1814–1815* (London, Ridgway, 1839), vol. II, p. 141).

<sup>31</sup> See G. F. de Martens, ed., *Nouveau Recueil de traités* (Goettingen, Dieterich, 1887), vol. II, p. 379. See also Feilchenfeld, *op. cit.*, pp. 123–124.

<sup>32</sup> Feilchenfeld, *op. cit.*, pp. 191–209.

<sup>33</sup> *British and Foreign State Papers, 1830–1831* (London, Ridgway, 1833), vol. XVIII, pp. 761–768.

37. What is known as the “Twelfth Protocol” proved, in fact, to be the first document which proposed a fairly specific mode of settlement of the debts. Its object was to identify the general principles to be applied in the Treaty of London.

(i) The principles

38. The five Powers first sought to justify their intervention by asserting that “experience ... had only too often demonstrated to them the *complete impossibility of the Parties directly concerned agreeing on such matters*,\* if the benevolent solicitude of the five Courts did not facilitate agreement”.<sup>34</sup> They cited the existence of relevant precedents which they had helped to establish and which “have in the past led to decisions *the principles of which, far from being new, were principles that had always governed the reciprocal relations of States*”<sup>35</sup> and which have been cited and confirmed in special agreements concluded between the five Courts; those agreements cannot therefore be changed in any case without the participation of the Contracting Powers”.<sup>35</sup>

39. One of the leading precedents relied upon by these five monarchies was apparently the Act of 21 July 1814 cited above,<sup>36</sup> article VI of which, as quoted earlier, provided that “since the burdens as well as the benefits are to be common, debts contracted up to the time of the union by the Dutch Provinces on the one hand and by the Belgian Provinces on the other shall be borne by the General Treasury of the Netherlands”, On the basis of this provision, the five Powers drew the conclusion of principle that “*upon the termination of the union, the community in question likewise should probably come to an end and, as a further corollary of the principle, the debts which, under the system of the union, had been merged, might, under the system of separation, be redivided*”.\*<sup>37</sup> Applying this principle in the case of the Netherlands, the five Powers concluded that “*each country should first resume exclusive responsibility for the debts which it owed before the union*”;<sup>38</sup> they considered it desirable to add: “*in fair proportion, the debts contracted since the date of this union and during the period of the union by the General Treasury of the Kingdom of the Netherlands, as they are shown in the budget of that Kingdom*”.\*<sup>39</sup>

(ii) The application of the principles: “Bases for establishing the separation of Holland and Belgium”<sup>40</sup>

40. The text of these “bases” is annexed to the Twelfth Protocol of the London Conference, dated

27 January 1831. Articles X and XI of these “bases” read as follows:

*Article X.* The debts of the Kingdom of the Netherlands for which the Royal Treasury is at present liable, namely (1) the outstanding debt on which interest is payable; (2) the deferred debt; (3) the various bonds of the Amortization Syndicate; and (4) the reimbursable annuity funds secured on State lands by special mortgages, shall be apportioned between Holland and Belgium in proportion to the average share of the direct, indirect and excise taxes of the Kingdom paid by each of the two countries during the years 1827, 1828 and 1829.

*Article XI.* Inasmuch as the average share in question makes Holland liable for 15/31 and Belgium liable for 16/31 of the aforesaid debts, it is understood that Belgium will continue to be liable for the payment of appropriate interest.

41. These provisions were objected to by France, which considered that “his Majesty’s Government has not found their bases *equitable enough*”<sup>41</sup> to be acceptable”.<sup>41</sup> The four Courts to which the French communication was addressed replied that:

The principle established in Protocol No. 12 with regard to the debt was as follows: When the Kingdom of the Netherlands was formed by the union of Holland with Belgium, the then existing debts of these two countries were merged by the Treaty of 1815 into a single whole and declared to be the national debt of the united Kingdom. It is therefore necessary and just that, when Holland and Belgium separate, each should resume responsibility for the debt for which it was responsible before their union and that these debts, which were united at the same time as the two countries, should likewise be separated.

Subsequent to the union, the united Kingdom has an additional debt which, upon the separation of the united Kingdom, must be *fairly* apportioned between the two States; the protocol does not, however, specify what exactly the fair proportion should be and leaves this question to be settled later.<sup>42</sup>

42. The Netherlands proved particularly satisfied and its plenipotentiaries were authorized to indicate their full and complete acceptance of all the basic articles designed to establish the separation of Belgium and Holland, which basic provisions derived from the London Protocols dated 20 and 27 January 1831.<sup>43</sup>

43. The Belgian point of view was set forth in a report to the Regent by the Belgian Minister for Foreign Affairs dated 15 March 1831, which stated:

Protocols Nos. 12 and 13, dated 27 January ... have shown in the most obvious manner the (no doubt involuntary) partiality of some of the plenipotentiaries in the Conference. These Protocols, dealing with the fixing of the boundaries, the armistice *and, above all, the apportionment of the debts*,\* arrangements which would consummate the ruin of Belgium, were restored ... by a note of 22 February, the last act of the Diplomatic Committee.<sup>44</sup> Belgium thus rejected the provisions of the “bases designed to establish the separation of Belgium and

<sup>34</sup> *Ibid.*, p. 761. [Translation by the Secretariat.]

<sup>35</sup> *Ibid.*

<sup>36</sup> See para. 35 above.

<sup>37</sup> *British and Foreign State Papers, 1830–1831* (London, Ridgway, 1833), vol. XVIII, p. 762.

<sup>38</sup> *Ibid.* [Translation by the Secretariat.]

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, p. 766.

<sup>41</sup> Twentieth Protocol of the London Conference, dated 17 March 1831 (annex A). Communication to the Conference by the plenipotentiary of France, Paris, 1 March 1831 (*ibid.*, p. 786).

<sup>42</sup> *Idem* (annex B). The plenipotentiaries of the four Courts to the plenipotentiary of France (*ibid.*, p. 791). [Translation by the Secretariat.]

<sup>43</sup> Eleventh Protocol of the London Conference, dated 20 January 1831 (determining the boundaries of Holland) (*ibid.*, p. 759) and Eighteenth Protocol, dated 18 February 1831 (*ibid.*, p. 779).

<sup>44</sup> *Ibid.*, p. 1235. [Translation by the Secretariat.]

Holland". More precisely, it made its acceptance dependent on the facilities to be accorded to it by the Powers in the acquisition, against payment, of the Grand Duchy of Luxembourg.

44. The Twenty-fourth Protocol of the London Conference, dated 21 May 1831, clearly showed that "acceptance by the Belgian Congress of the bases for the separation of Belgium from Holland would be very largely facilitated if the five Courts consented to support Belgium in its wish to obtain, against payment, the Grand Duchy of Luxembourg".<sup>45</sup> As Belgium's wish could not be satisfied, that country refused to agree to the debt apportionment proposals which had been made to it. The Powers thereupon took it upon themselves to devise another formula for the apportionment of the debts; this was the object of the Twenty-sixth Protocol of the London Conference.

b. The twenty-sixth Protocol of the London Conference, dated 26 June 1831

45. This new Protocol contained a draft treaty consisting of 18 articles. Article XII stated that the debts shall be apportioned in such a way that each of the two countries shall be liable for all the debts which *originally*,\* before the union encumbered *the territories*\* composing them and in such a way that debts which were *jointly contracted shall be divided up in a just proportion*.\*<sup>46</sup>

This was, in fact, only a reaffirmation, not spelt out in figures, of the principle of the apportionment of debts contained in the Twelfth Protocol of 27 January 1831. Unlike that Protocol, however, the new Protocol did not specify the debts for which the parties were liable. This time, it was the Kingdom of the Netherlands which rejected the proposals of the Conference,<sup>47</sup> and Belgium which agreed to them.<sup>48</sup>

46. Before the Conference adjourned on 1 October 1832,<sup>49</sup> it made several unsuccessful proposals and counter-proposals.<sup>50</sup> Not until seven years later did the Belgian-Netherlands treaty of 9 April 1838 devise a solution to the problem of the succession to debts arising out of the separation of Belgium and Holland.

<sup>45</sup> *Ibid.*, p. 798. [Translation by the Secretariat.]

<sup>46</sup> *Ibid.*, pp. 804 and 805. [Translation by the Secretariat.]

<sup>47</sup> See the Twenty-eighth Protocol of the London Conference, dated 25 July 1831, annex A, "the Government of the Netherlands to the Conference", The Hague, 12 July 1831 (*ibid.*, pp. 808-816 and, in particular, p. 815).

<sup>48</sup> See the Twenty-seventh Protocol of the London Conference, dated 12 July 1831, annex, "the Belgian Government to the Conference", Brussels, 9 July 1831 (*ibid.*, p. 806).

<sup>49</sup> Seventieth (final) Protocol of the London Conference, dated 1 October 1832 (*ibid.*, 1831-1832 (London, Ridgway, 1834), vol. XIX, p. 184).

<sup>50</sup> These proposals and counter-proposals included those made in two Protocols and a treaty:

(a) Forty-fourth Protocol of the London Conference, dated 26 September 1831 (annex A), proposals by the London Conference, item 3 of which contains twelve articles, the first three of which provide that:

"VII. Belgium, including the Grand Duchy of Luxembourg, shall be liable for the debts which it had lawfully contracted before the establishment of the Kingdom of the Netherlands.

"Debts lawfully contracted from the time of the establishment of the Kingdom until 1 October 1830 shall be equally apportioned.

(ii) *The Belgian-Dutch Treaty of London, dated 19 April 1839, relative to the separation of their respective territories*

47. The Belgian-Dutch dispute concerning succession to the State debts of the Netherlands was finally settled by the Treaty of 19 April 1839, article 13 of the annex to which contained the following provisions:

1. As from 1 January 1839, Belgium shall, by reason of the apportionment of the public debts of the Kingdom of the Netherlands, continue to be liable for a sum of 5 million Netherlands florins in annuity bonds, the principal of which shall be transferred from the debit side of the Amsterdam ledger or of the ledger of the General Treasury of the Kingdom of the Netherlands to the debit side of the ledger of Belgium.

2. The principal transferred and the annuity bonds entered on the debit side of the ledger of Belgium in accordance with the preceding paragraph, up to a total of 5 million Netherlands florins in annuity payments, shall be considered as part of the Belgian national debt and Belgium undertakes not to allow, either now or in future, any distinction to be made between the portion of its public debt resulting from its union with Holland and any other existing or future Belgian national debt.

3. The aforesaid sum of 5 million Netherlands florins of annuities shall be paid regularly every six months, in cash, either at Brussels or at Antwerp, without any deduction of any kind whatever, either now or in future.

4. By the creation of the said sum of 5 million florins of annuities, Belgium shall be discharged vis-à-vis Holland of any obligation resulting from the apportionment of the public debts of the Kingdom of the Netherlands.

"VIII. Expenditures by the Treasury of the Netherlands for special items which remain the property of one of the two Contracting Parties shall be charged to it, and the amount shall be deducted from the debt allocated to the other Party.

"IX. The expenditures referred to in the preceding article include the amortization of the debt, both outstanding and deferred, in the proportion of the original debts, in accordance with article VII." (*Ibid.*, 1830-1831 (London, Ridgway, 1833), vol. XVIII, pp. 867 and 868).

These proposals, which were the subject of strong criticism by both the States concerned, were not adopted.

(b) Forty-ninth Protocol of the London Conference, dated 14 October 1831 (annex A), articles concerning the separation of Belgium from Holland, of which the first two paragraphs of a long article XIII read as follows:

"1. As from 1 January 1832, Belgium shall by reason of the apportionment of the public debts of the Kingdom of the Netherlands, continue to be liable for a sum of 8,400,000 Netherlands florins in annuity bonds, the principal of which shall be transferred from the debit side of the Amsterdam ledger or of the ledger of the General Treasury of the Kingdom of the Netherlands to the debit side of the ledger of Belgium.

"2. The principal transferred and the annuity bonds entered on the debit side of the ledger of Belgium in accordance with the preceding paragraph, up to a total of 8,400,000 Netherlands florins of annuity bonds, shall be considered as part of the Belgian national debt, and Belgium undertakes not to allow, either now or in future, any distinction to be made between this portion of its public debt resulting from its union with Holland and any other existing or future Belgian national debt." (*Ibid.*, pp. 897 and 898.)

Belgium had agreed to this provision (*ibid.*, pp. 914 and 915).

(c) The Treaty for the final separation of Belgium from Holland, signed at London by the five Courts and by Belgium on 15 November 1831 (*ibid.*, p. 645), used the wording of the provisions of the Forty-ninth Protocol reproduced above; but, this time as well, it was not accepted by Holland (see the Fifty-third Protocol of the London Conference, dated 4 January 1832 (annex A) (*ibid.*, 1831-1832 (London, Ridgway, 1834), vol. XIX, p. 57). [Translation by the Secretariat.]

5. Auditors appointed by each of the Parties shall meet within 15 days after the exchange of the ratifications of the present treaty, in the city of Utrecht, for the purpose of effecting the transfer of the principal and annuity bonds which, as a result of the apportionment of the public debts of the Kingdom of the Netherlands, are to become Belgium's liability, up to an amount of 5 million florins of annuities. The auditors shall also effect the extradition of any archives, maps, plans and documents belonging to Belgium or concerning its administration.<sup>51</sup>

48. The five Powers of the Holy Alliance, under whose auspices the 1839 Treaty was signed, guaranteed its provisions in two conventions of the same date signed by them and by Belgium and Holland. It was stated in those instruments that the articles of the Belgian-Dutch Treaty "are deemed to have the same force and value as they would have if they had been included textually in the present instrument and are consequently placed under the guarantee of Their Majesties".<sup>52</sup>

### 3. THE DISSOLUTION OF THE UNION BETWEEN NORWAY AND SWEDEN (1905)<sup>53</sup>

49. The decision taken on 7 June 1905 by the Storting, the Norwegian Parliament, which took note of the fact that the royal power had "ceased to operate" as such for Norway, *ipso facto* terminated the union between Sweden and Norway formed by the Act of Union of 31 July and 6 August 1815. The union still had to be dissolved. This was done at the Swedish-Norwegian Conference, which met in late August 1905 at Karlstad to prepare several conventions, which were subsequently signed at Stockholm on 26 October 1905. The treatment of debts was decided by the Agreement dated 23 March 1906, relating to the settlement of economic questions arising in connexion with the dissolution of the union between Norway and Sweden,<sup>54</sup> which is commonly interpreted to mean that each State continued to be liable for its own debts.

50. Accordingly, Paul Fauchille has stated:

After Sweden and Norway had dissolved their real union in 1905, a convention between the two countries, dated 23 March 1906, made each one of them responsible for its personal debts.<sup>55</sup> A few years later, Alexandre N. Sack expressed a similar view, stating that "after the dissolution of their union in 1904, the two States continued to be

liable for their respective debts, without any apportionment".<sup>56</sup>

51. These views are in keeping with the type of union formed by Sweden and Norway.<sup>57</sup> Whether the union is considered to a real or personal union, one can only say, as the Special Rapporteur has noted, that each member State of the union remained responsible for its own debts because "the debts of neither State devolved upon the union".<sup>58</sup> A union nevertheless presupposes a minimum of common institutions and, consequently, of common expenses to be defrayed. In the case of the union of Sweden and Norway, common institutions and dealings were limited to a single monarch and joint diplomacy.

52. In this respect, the Convention of 23 March 1906 contained the following provisions:

*Art. 1.* Norway shall pay to Sweden the share applicable to the first half of 1905 of the appropriations voted by Norway out of the common budget for the foreign relations of Sweden and Norway in respect of that year, into the Cabinet Fund, and also, out of the appropriations voted by Norway for contingent and unforeseen expenditures of the Cabinet Fund for the same year, the share attributable to Norway of the cost-of-living allowances paid to the agents and officials of the Ministry of Foreign Relations for the first half of 1905.

*Art. 2.* Norway shall pay to Sweden the share applicable to the period 1 January-31 October 1905 of the appropriations voted by Norway out of the common budget for that year, into the Consulates Fund, and also the share attributable to Norway of the following expenditures incurred in 1904 and not accounted for in the appropriations for that year:

(a) The actual service expenditures of the consulates for the whole of 1904; and

(b) The office expenses actually attributed to the remunerated consulates, subject to production of documentary evidence, for the second half of 1904.<sup>59</sup>

53. These provisions, the purpose of which was to make Norway assume its share of common budget expenditures, become clearer if it is remembered that, by a duplication of functions, the King of Sweden was, at the same time, the King of Norway and that Swedish institutions were exclusively responsible for the diplomatic and consular representation of the union. In this connexion, it should be noted that the pretext for or the cause of the break between the two States was Norway's wish to ensure its own foreign representation.

From the foregoing considerations, it may be inferred that the consequences of the dissolution of the Swedish-Norwegian union were, *first, the continued liability of each of the two States for its own debts and, secondly, an apportionment of the common debts between the two successor States.*

<sup>51</sup> *Ibid.*, 1838-1839 (London, Harrison, 1956), vol. XXVII, p. 997. [Translation by the Secretariat.]

<sup>52</sup> Treaty made and signed in London on 19 April 1839, between Austria, France, Great Britain, Prussia and Russia, on the one part, and the Netherlands on the other, relative to the separation of Belgium and the Netherlands, art. 2 (*ibid.*, p. 992), and Treaty made and signed in London on 19 April 1839, between Austria, France, Great Britain, Prussia and Russia, on the one part, and Belgium on the other, art. 1 (*ibid.*, p. 1001).

<sup>53</sup> See L. Jordan, *La séparation de la Suède et de la Norvège* (Paris, Pedone, 1906) (thesis); P. Fauchille, *Traité de droit international public* (8th edition of the *Manuel de droit international* by H. Bonfils) (Paris, Rousseau, 1922), vol. I, p. 234.

<sup>54</sup> Baron Descamps and L. Renault, *Recueil international des traités du XX<sup>e</sup> siècle, année 1906*, (Paris, Rousseau, 1914) pp. 858-862.

<sup>55</sup> Fauchille, *op. cit.*, p. 389.

<sup>56</sup> A. N. Sack, *Les effets des transformations des Etats sur leurs dettes publiques et autres obligations financières* (Paris, Sirey, 1927), vol. I, p. 104, *in fine*.

<sup>57</sup> For conflicting descriptions of this union, see Fauchille, *op. cit.*, p. 234.

<sup>58</sup> *Yearbook ... 1977*, vol. II (Part One), p. 114, document A/CN.4/301 and Add.1, para. 432.

<sup>59</sup> Descamps and Renault, *op. cit.*, pp. 858-859. [Translation by the Secretariat.]



#### 4. THE BREAK-UP OF THE UNION BETWEEN DENMARK AND ICELAND (1944)

54. Article 1 of the "Danish Act on the constitutional position of Iceland in the monarchy", dated 2 January 1871, provided that "Iceland [was] an inseparable part of the Danish State, with special privileges".<sup>60</sup> One of these privileges was that, under article 2, "[Iceland] will not be required to make any contribution to the general needs of the monarchy".<sup>61</sup> In addition, under article 5 of the Act in question, Denmark had an obligation to provide a large annual subsidy to Iceland, which was granted a certain amount of autonomy for the conduct of its own affairs.

55. After the First World War, the Act of 30 November 1918 establishing the Union between Denmark and Iceland stated, in article 1, that

Denmark and Iceland shall be two free and sovereign States, united by the fact that they have the same King and by the agreement contained in this Act of Alliance. The names of the two States shall be included in the title of the King.<sup>62</sup>

That Act did not provide a very clear solution to the debt problem. Section III, article 11, of the Act nevertheless stated that "with regard to the contribution of Iceland to the expenses incurred in connexion with the cases mentioned in this section,\* matters which have not been regulated in the foregoing articles shall be dealt with in an agreement between the two countries".<sup>63</sup> As the Special Rapporteur has noted, this indicates that "each State was to make its contribution to the common expenses".<sup>64</sup>

56. Upon the dissolution of the Union, in 1944, the question of the succession to debts remained unanswered, most probably because the question was not relevant. In any event, one writer has stated that "since the separation of the two countries in respect of finances took place in 1871, the final separation in 1944 could not have any financial consequences".<sup>65</sup>

#### 5. THE DISSOLUTION OF THE UNITED ARAB REPUBLIC (1960)

57. The United Arab Republic, which was formed by the Provisional Constitution of 5 March 1958, was dissolved some two and one half years later as a result of Syria's withdrawal. The dissolution of this ephemeral union does not seem to be particularly relevant to the problem of succession to the debts of the union. When the United Arab Republic was

<sup>60</sup> F.-R. Dareste and P. Dareste, *Les Constitutions modernes*, vol. II, 3rd ed. (Paris, Challamel, 1910), p. 24 [Translation by the Secretariat.]

<sup>61</sup> *Ibid.*

<sup>62</sup> Dareste and Dareste, *op. cit.*, *Europe*, vol. I, 4th ed., wholly revised (Paris, Sirey, 1928), p. 413.

<sup>63</sup> *Ibid.*, p. 414.

<sup>64</sup> *Yearbook ... 1977*, vol. II (Part. One), p. 114, document A/CN.4/301 and Add.1, para. 435.

<sup>65</sup> I. Paenson, *Les conséquences financières de la succession d'Etats* (Paris, Domat-Montchrestien, 1954), p. 63.

formed, it was already known that nothing very explicit had been said with regard to the possible succession of the union to the debts of the member States.<sup>66</sup> The same uncertainty accompanied the reverse process of dissolution. At the present stage in his documentary research, the Special Rapporteur has been unable to determine what solutions were found to the problem of the succession to the union's debts after its dissolution.

#### 6. THE DISSOLUTION OF THE FEDERATION OF MALI (1960)

58. The Federation of Mali, established by the Constitution of 17 January 1959, was to withstand only for a short time the forces which were then working for the "balkanization" of Africa and which, as early as 1960, destroyed what had been described as "a landmark in the creation of a large West African State".<sup>67</sup> In August 1960, the Federation was dissolved.

59. This explains why the International Law Commission expressed the view that "the facts concerning the dissolution of that extremely ephemeral federation are thought to be too special for it to constitute a precedent from which to derive any general rule".<sup>68</sup> That comment would have been fully as relevant to the problem of debts if the Federation had had to deal with that problem. The Special Rapporteur has not, however, been able to form a definite opinion. All he can report is that on 11 July 1964 a communiqué issued after the meeting of the Joint Senegalese-Malian Commission announced that "Mali would gradually pay its debts to Senegal".<sup>69</sup> No further details are available.

#### 7. THE DISSOLUTION OF THE FEDERATION OF RHODESIA AND NYASALAND (1963)

60. The Federation of which Northern Rhodesia, Southern Rhodesia and Nyasaland had been members since 1953 was dissolved in 1963 by an Order in Council of the British Government. The Order also apportioned the federal debt among the three territories in the following proportions: Southern Rhodesia 52 per cent, Northern Rhodesia 37 per cent and Nyasaland 11 per cent. The apportionment was made on the basis of the share of the federal income allocated to each territory.<sup>70</sup> This apportionment of the debts, as operated by the British Government's Order in Council, was challenged as to both its principle and its procedure.

<sup>66</sup> See *Yearbook ... 1977*, vol. II (Part One), p. 116, document A/CN.4/301 and Add.1, para. 448.

<sup>67</sup> P.-F. Gonidec, *Constitutions des Etats de la Communauté* (Paris, Sirey, 1959), p. 73.

<sup>68</sup> *Yearbook ... 1972*, vol. II, p. 294, document A/8710/Rev.1, chap. II, sect. C, art. 27, para. 11 of the commentary.

<sup>69</sup> F. Moussu, "Chronologie des faits internationaux d'ordre juridique", *Annuaire français de droit international*, 1964 (Paris, 1965), vol. X, p. 1000.

<sup>70</sup> O'Connell, *op. cit.*, p. 393.

61. It was first pointed out that "Since the dissolution was an exercise of Britain's sovereign power, Britain should assume responsibility."<sup>71</sup> This observation was all the more pertinent as the debts thus apportioned among the successor States by a British act of authority included debts contracted, under the administering Power's guarantee, with IBRD. This explains the statement by Northern Rhodesia that "it had at no time agreed to the allocation laid down in the Order and had only reluctantly acquiesced in the settlement."<sup>72</sup> O'Connell indicates that Zambia, formerly Northern Rhodesia, later dropped its claim, because of the aid granted to it by the United Kingdom Government.<sup>73</sup>

## B. Comments and conclusions concerning the practice of States

62. Two conclusions which may be drawn from these cases of succession of States in respect of debts would merit consideration by the Commission in its work of codifying and progressively developing this highly complex subject. The first conclusion concerns the nature of the problems which arise in connexion with the succession of States in respect of debts. The second relates to the classification of the type of State succession exemplified by the precedents cited, and particularly the Belgian-Dutch case.

### I. THE NATURE OF THE PROBLEMS

63. The attempt to resolve the problems of the devolution of State debts amounts, in the final analysis, especially in the case of the dissolution of a State, to seeking to adjust the interests of the States involved. These interests are often substantial and almost always conflicting and, in many cases, their reconciliation will call for difficult negotiations between the States directly affected by State succession. Only these States really know what are their own interests; they are often the best qualified to defend those interests and, in any event, they alone know how far they can go in making concessions.

64. These considerations are most strikingly illustrated by the case of the dissolution of the Belgian-Dutch State, where the two successor States refused to submit to the many settlement proposals made by third States, which happened to be the major Powers at that time. The eventual solution was worked out by the States concerned themselves, although a certain kinship is discernible between the various types of settlement proposed to them and the solutions they ultimately adopted. While it is undeniably more than desirable – indeed necessary – to leave the par-

ties involved the amplest latitude in seeking an agreement acceptable to each of them, nevertheless this "face-to-face" confrontation might, in some situations, prove prejudicial to the interests of the weakest party.

65. It is appropriate, therefore, in order to minimize, if not to avoid, a clash of interests, to suggest certain principles for the guidance of the parties. Where successor States with divergent interests are involved, *equity* can and should have a prominent place in the settlement. This becomes eminently clear from the various Protocols of the London Conference relating to the separation of Belgium and Holland. In particular, the Forty-eighth Protocol of 6 October 1831<sup>74</sup> makes several references to *the concept of equity as the guiding principle in the apportionment of debts between the two successor States*, and states expressly that "the Conference considered the procedure to be followed in order to achieve an *equitable apportionment*\* of the debts and liabilities ... between Holland and Belgium".<sup>75</sup>

66. In the course of its deliberations, the London Conference found it "more just" to base the apportionment of the debts on the criterion of population size or of the taxes paid by the population. It considered it "*equitable*" that the debts contracted during the union by the Kingdom of the Netherlands should be shared [between the two successor States] in equal halves.<sup>76</sup> A sum of 5 million Netherlands florins, corresponding to this equal share, was ultimately held to be payable by Belgium under the Treaty of 19 April 1839, which sealed the agreement between the two parties. Thus the two States did in fact share the debts "on a basis of strict equality (half shares)."<sup>77</sup>

67. In the same Forty-eighth Protocol, the Conference also stressed that it intended to take account of the "rules of equity" in seeking a solution, but it did not succeed anywhere in giving a definition of these rules, which is not surprising, for the meaning of equity has to be construed above all in the context of specific cases and particular situations. One writer aptly describes this concept as "*the achievement of justice in a particular instance*".<sup>78</sup> The attempt to codify the rules of equity certainly seems to be, if not an impossible exercise, at least an unprofitable one. The States affected by a State succession should have full latitude to work out the solution which in their view best reflects what they understand by equity, having regard to the circumstances of time and place and to the conditions characterizing the particular case.

<sup>74</sup> *British and Foreign State Papers, 1838-1839* (London, Harrison, 1856), vol. XXVII, pp. 887-890.

<sup>75</sup> *Ibid.*, p. 888. [Translation by the Secretariat.]

<sup>76</sup> *Ibid.*, p. 889.

<sup>77</sup> Rousseau, *op. cit.*, p. 464.

<sup>78</sup> A. Decencière-Ferrandière, "Quelques réflexions touchant le règlement des conflits internationaux", *Mélanges A. Decencière-Ferrandière* (Paris, Pedone, 1940), p. 107.

<sup>71</sup> *Ibid.*, p. 394.

<sup>72</sup> *Ibid.*, p. 393.

<sup>73</sup> *Ibid.*, foot-note 6.

## 2. PROBLEMS OF CLASSIFICATION OF CERTAIN CASES OF SUCCESSION OF STATES

68. A particular instance of succession cannot always be categorized strictly as the result of a "secession-type of separation" or as the result of "the dissolution of a State". In its 1972 draft provisional articles on the succession of States in the matter of treaties, the Commission drew a sharp distinction between separation, or secession, and the dissolution of a State.<sup>79</sup> After this approach had been challenged by a number of States in their comments on the draft,<sup>80</sup> and by certain representatives in the Sixth Committee at the twenty-eighth session of the General Assembly, the Commission, subsequently, in its 1974 draft articles on the succession of States, slightly modified the treatment of these two cases. While maintaining the theoretical distinction between the dissolution of a State and the separation of the parts of a State, it dealt with the two cases simultaneously in a single article from the standpoint of the successor States (art. 33), and dealt in another provision with the case of the separation of parts of a State viewed from the standpoint of the predecessor State, where the latter continues to exist (art. 34).<sup>81</sup> In the case of succession to State property, the Commission considered that the distinction between succession and dissolution should be maintained, in view of the special characteristics of succession in that field. It devoted two separate articles to the two types of succession, but provided a joint commentary on both.<sup>82</sup>

69. In choosing from history examples reflecting the practice of States and in classifying them into those of the separation/secession type and those of the dissolution type, the Special Rapporteur took mainly into account the fact that, in a case of the first type, the predecessor State survives the transfer of territory, whereas in a case of the second type it ceases to exist. In the first case, the problem of the apportionment of debts arises between a predecessor State and one or more successor States, whereas in the second case it affects successor States *inter se*. Yet, even this apparently very dependable criterion of the State's disappearance or survival cannot ultimately be altogether relied upon for sure guidance, for it raises, in particular, the thorny problems of the State's continuity and identity.

70. In the case of the disappearance of the Kingdom of the Netherlands in 1830, which the Special Rapporteur has considered, not without some hesitation, under the heading "Dissolution of the State", rather than under that of separation, the predecessor

State, the Belgian-Dutch monarchical entity, seems genuinely to have disappeared and to have been replaced by two new successor States, Belgium and Holland, each of which assumed responsibility for half of the debts of the predecessor State. In a way, it was actually the mode of settlement of the apportionment of the debts that confirmed the nature of the event which occurred in the Dutch monarchy and made it possible to describe it as "the dissolution of a State". It was possible to regard the Netherlands example from another point of view – to treat it as a case of secession – and to hold, like Feilchenfeld, that "from a legal point of view, the independence of Belgium was nothing more than a secession of a province".<sup>83</sup> To have so treated it might have proved seriously prejudicial to Holland's interests if that view had been acted upon, precisely in so far as it was not apparently demonstrated that the secessionist province was legally bound to participate – let alone in equal proportion – in the servicing of the debt of the dismembered State.

71. This viewpoint was not, in fact adopted by the London Conference or even by the parties themselves, least of all by Belgium. Both States regarded their separation as the *dissolution of a union*, and each claimed for itself the title of successor State to a predecessor State that had ceased to exist. This is the treatment adopted in the above-mentioned Treaty of London of 19 April 1839 concluded between the five Powers and the Netherlands, article 3 of which provided that "*The union\** which existed between Holland and Belgium under the Treaty of Vienna of 31 May 1815 is recognized by His Majesty the King of the Netherlands, Grand Duke of Luxembourg, as being *dissolved*".<sup>84</sup>

72. It should be noted, however, that in this particular case its proposed classification as one of "dissolution of a union" might run into a possible difficulty, in that, at the time of their union, neither Holland nor Belgium constituted States. Holland had lost that status upon its annexation by France at the time of the Revolution, and Belgium had not yet attained international sovereignty. Possibly for the sake of convenience and to make it easier to work out a solution, the separation of Belgium and Holland came to be classified as a case of dissolution of a union. Still, there is no doubt that the Congress of Vienna of 1815, which brought the Napoleonic era to an end, had meant to restore to the Netherlands its former statehood, before uniting that country with Belgium.

In any event, the material point, which is also valid for the other examples considered in this report under the heading of the practice of States, is that dissolution carries with it the disappearance of the predecessor State, which is totally dismembered as a result, whereas upon the separation of one or more parts of

<sup>79</sup> See *Yearbook ... 1972*, vol. II, pp. 292 and 295, document A/8710/Rev.1, chap. II, sect. C, art. 27 and 28.

<sup>80</sup> See *Yearbook ... 1974*, vol. II (Part One), pp. 68–71, document A/CN.4/278 and Add.1–6, sect. III, art. 27.

<sup>81</sup> *Ibid.*, pp. 260 *et seq.*, document A/9610/Rev.1, chap. II, sect. D, art. 33 and 34.

<sup>82</sup> *Yearbook ... 1976*, vol. II (Part Two), p. 128, document A/31/10, chap. IV, sect. B.2, art. 15 and 16.

<sup>83</sup> Feilchenfeld, *op. cit.*, p. 208.

<sup>84</sup> *British and Foreign State Papers, 1838–1839* (London, Harrison, 1856), vol. XXVII, p. 993. [Translation by the Secretariat.]

a State's territory the predecessor State can survive. This is the decisive point in the classifications made, not without some hesitation, by the Special Rapporteur. This last remark shows, moreover, beyond question that there is a kinship of situations which calls, if not for like solutions, at least for analogous solutions as regards the apportionment of debts in the cases of separation and of dissolution.

### C. Solutions proposed

73. Fauchille suggests the following rule:

If a State ceases to exist by breaking up and dividing into several new States, each of the latter shall in *equitable proportion*\* assume responsibility for a share of the debts of the original State as a whole, and each of them shall also assume exclusive responsibility for the debts contracted in the exclusive interest of its territory.<sup>85</sup>

74. A comparable formula is offered by Bluntschli, article 49 of whose codification of international law provides that:

If a State should divide into two or more new States, none of which is to be considered as the continuation of the former State, that former State is deemed to have ceased to exist and the new States replace it with the status of new persons.<sup>86</sup>

Bluntschli too recommends the equitable apportionment of the debts of the extinct predecessor State and cites as an example "the division of the Netherlands into two kingdoms, Holland and Belgium", though he considers that the former Netherlands was in a way continued by Holland "particularly as regards the colonies".<sup>87</sup>

75. Logically, in the apportionment of debts, which should always be governed by the principle of equity, a distinction should be drawn between the dissolution of a union and the dissolution of a unitary State. In practice, many a union between two States has often seemed to be reminiscent of a union of two persons who elect, in their marriage contract, to apply what is known in French civil law as *le régime de la communauté réduite aux acquêts*" (régime of the community to which only acquêts accrue). In such a case, each of the two spouses retains the assets he or she possessed before the marriage and is alone answerable for his or her pre-existing debts. The two spouses are responsible for and share only those common debts which they contracted during their union. In the event of divorce, what happens in effect

is a restoration of the *status quo ante*, combined with an apportionment of the debts contracted in common during the marriage.

In the case of the dissolution of a unitary State, i.e. in the event of a total dismemberment of that State, which thereby ceases to exist, what is to be apportioned is the totality of the debts of the extinct State. One cannot speak of a *status quo ante*, for there is no such *status*. However, in order not to have to make the distinction in a draft rule, it is sufficient to bear in mind that the only issue under consideration in the present context is that concerning the State debts of the predecessor State, as distinct from the individual debts of each territory (or of each State) composing the predecessor State. The dissolution of the union or unitary State affects only the treatment of the common State debts for which the predecessor State was until then responsible.

76. The difference between the case of separation and that of the dissolution of a State should not be ignored. In the former case, the predecessor State survives and may still answer for its debts, particularly if the seceding State coming into being by non-pacific means through the separation of one part of the predecessor State's territory rejects any agreement concerning the apportionment of the debts. In the latter case, that of the dissolution of a State, the totally dismembered State disappears, and this circumstance appears to acquire considerable importance in this subject of State debts, for the creditors have to know what will be the treatment of their claims in the event of the total disappearance of the predecessor State. In that situation, the various successor States coming into existence in consequence of the dissolution of the predecessor State can act only by agreement and generally manage to apportion in this way the State debt of the extinct predecessor State. This is why it would seem, in the light of State practice, that agreement should be the keystone of the rule to be drawn up.

77. Accordingly, the Commission might wish to consider, as part of the rules to be prepared regarding this topic, a draft article on the following lines:

#### Article 25. Dissolution of a State

Where a State is dissolved and disappears and the parts of its territory form two or more States, the apportionment of the State debts of the predecessor State shall be settled by agreement between the successor States.

In the absence of agreement, responsibility for the State debts of the predecessor State shall be assumed by each successor State in an equitable proportion, taking into account such factors as its tax-paying capacity and the property, rights and interests passing to it in connexion with the said State debts.

<sup>85</sup> Fauchille, *op. cit.*, p. 380.

<sup>86</sup> J. G. Bluntschli, *Le droit international codifié*, 5th ed. (Paris, Alcan, 1895), p. 82.

<sup>87</sup> *Ibid.*

## DOCUMENT A/CN.4./L.282\*

**Draft articles on succession of States in respect of matters other than treaties:  
memorandum submitted by Mr. Tsuruoka  
regarding article 23, paragraph 2, adopted by the Commission**

[Original: English]  
[21 July 1978]

1. At its 1515th meeting on 11 July 1978, the Commission adopted article 23 as proposed by the Chairman of the Drafting Committee, Mr. Schwebel. The text adopted finally by the Commission reads as follows:

*Article 23. Uniting of States*

1. When two or more States unite and thus form a successor State, the State debt of the predecessor States shall pass to the successor State.

2. Without prejudice to the foregoing provision, the successor State may, in accordance with its internal law, attribute the whole or any part of the State debt of the predecessor States to the component parts of the successor State.

2. Paragraph 1 contains no drafting change from draft article 23, paragraph 1, as adopted by the Drafting Committee (A/CN.4/L.272). It was the general view of the Commission that paragraph 1 was well drafted by the Drafting Committee and therefore raises no serious problem in substance as well as in form. I share this general view.

3. Paragraph 2, however, gives rise to a number of difficulties. The paragraph provides in essence that the successor State, in the case of the uniting of States, can unilaterally attribute to its component parts the State debt it has succeeded to from the predecessor States. This provision appears contrary to the generally accepted principle of law with regard to financial transaction, in particular that of a transnational character. The generally accepted principle with regard to financial transaction tells us that a debtor must not, without the consent of the creditor modify the terms and conditions of the financial obligation it has undertaken. This is a corollary of the well-known principle *pacta sunt servanda*. Attribution of the debt to another entity is a most notable kind of modification to the terms and conditions of the debt, and accordingly should be permitted only with the consent of the creditors concerned. For this reason, I had proposed (1515th meeting, para. 7) to insert a phrase "with the consent of the creditors concerned" in the text of article 23, paragraph 2, proposed by the Drafting Committee.

4. In the debate of the Commission, one member opposed the insertion of such a phrase on the ground that to require the debtor State to obtain the consent of the creditors (who may well be private persons) in attributing its debt to its component parts is a case which involves serious infringement of the State sovereignty of the debtor State, because the attribution of its debt to its component parts is a purely domestic matter of the debtor State. It is hard for me to go along with this argument. When a State borrows money from an entity (presumably a foreign entity in this case, i.e. a foreign State or a foreign private person or an international organization) that State, just like any debtor, is obliged to abide by the terms and conditions of such a financial transaction. It is a well-established principle in the community of nations that subjecting the debtor State to such terms and conditions for a particular financial transaction does not involve any infringement of the sovereignty of the debtor State. This is true whoever the creditor may be because sovereignty of the debtor State may be infringed by a State as well as by any other entity.

5. Furthermore, in many transnational financial transactions, the terms and conditions include a provision which states that the debtor State may modify such terms and conditions (for instance, the schedule of repayment) if the creditor so consents. To require the consent of the creditor in such a case has never been regarded as an infringement of the sovereignty of the debtor State. It simply means that a debtor State cannot unilaterally modify the terms and conditions of the debt it has undertaken. I see no reason why the same principle should not be applied to the requirement of the consent of the creditors when the successor States wishes to attribute to its component parts the State debt of the predecessor States in the case of the uniting of States.

6. Several members also expressed concern that the words "with the consent of the creditors concerned" might entail interference in the domestic affairs of the successor State because they believed that all that the creditors are interested in is the securing of the repayment of the debt and that the creditors are not concerned about how the money would be collected by the successor State to meet the debt servicing, which is purely a domestic matter. I completely agree

\* Incorporating document A/CN.4/L.282/Corr.1.

that how the successor State arranges to meet the debt servicing is a purely domestic matter. I further agree that to require the consent of the creditors for such an arrangement is not necessary. However, this was not my intention when I proposed the insertion of the words "with the consent of the creditors concerned." My proposal is based on the understanding that paragraph 2 as proposed by the Drafting Committee does not provide for the freedom of the successor State to arrange whatever way it likes to collect money to repay the State debt it has succeeded to, but provides for *the freedom of the successor State to attribute* in accordance with its internal law such State debt to its component parts. Attribution of the debt to the component parts of the successor State means, for me, the transfer from the successor State to its component parts of the obligation to repay the debt. I do not think it is justified to permit the successor State to transfer the obligation to repay its debt to its component parts unilaterally without the consent of the creditors concerned. To require the consent of the creditors in such a case has nothing to do with the sovereignty of the successor State.

7. Speaking of sovereignty, I would rather argue that not to require the consent of the creditors might entail the infringement of the sovereignty of the creditors when the creditors concerned are States. Paragraph 2 as worded permits the successor State to attribute its international debt to its component parts in accordance with its internal law, even if the creditors are States. It means that the character of the State debt can be changed unilaterally by the successor State. Is not this the infringement of the sovereign equality of the creditor States, because the debtor State and the creditor States are not treated on equal footing? I think it is. By attributing the State debt from the successor State to its component parts, the State debt becomes the debt of the component parts concerned. This means either that the State debt which has been regulated under international law will no more be regulated by it or that the component parts have now become subjects of international law. Whichever position one takes, it is clear that there is a substantial change in the character of the State debt in question. Such change should not be allowed by a unilateral action of the successor State because the creditor States should also be permitted to participate on an equal basis in introducing changes in the character of the State debt.

8. Furthermore, paragraph 2 implies that the creditor States are compelled to comply with the internal law of the successor State because the attribution of the debt would be done in accordance with the internal law of the successor State. Is not this the infringement of the sovereignty of the creditor States? I think it is. The internal law of the successor State is a unilateral expression of the will of the successor State. No other State should, by virtue of its sovereignty, be made subject to such unilateral expression of the will of the successor State without its express consent. For this reason, the Commission has in the past carefully avoided as much as possible any *renvoi* to the inter-

nal law of a State. Thus, only with the *consent* of the creditor States do the provisions of article 23, paragraph 2, become free from criticism from the standpoint of sovereignty.

9. I admit that the amendment proposed by Mr. Schwebel (and adopted by the Commission) is a considerable improvement on the original text proposed by the Drafting Committee. The original text was as follows:

2. *Paragraph 1 is without prejudice to\** the attribution of the whole or any part of the State debt of the predecessor States to the component parts of the successor State in accordance with the internal law of the successor State.

Obviously, it is inappropriate to employ the expression "Paragraph 1 is without prejudice to ...", because such expression restricts the application of the principle of international law as stated in paragraph 1 by a unilateral action of the successor State. For this reason, I welcome the amendment proposed by Mr. Schwebel, which acknowledges that, whatever is provided for in paragraph 2, the provision of paragraph 1 always stands. However paragraph 2 of article 23 is not free from criticism.

10. First of all, it is not at all clear who would be the debtors after the attribution, under paragraph 2, of the State debt to the component parts of the successor State. It is natural to assume that after the attribution of such debt, the component parts concerned would become the new debtors. However, the same paragraph says that this provision is *without prejudice to paragraph 1*. Accordingly, by virtue of paragraph 1, the successor State is *also* liable to repay the debt. Then, are the successor State and its component parts to which the State debt is attributed co-debtors (if this is the case, the creditors may at their choice go to either of them to seek prepayment)? Or is the successor State merely a guarantor of the State debt attributed to its component parts which are the new debtors? Or is the successor State still the debtor of the State debt, even under paragraph 2, while its component parts are merely under an obligation to co-operate (under the internal law of the successor State) with the successor State to repay the debt (if this is the case, there is no need to include paragraph 2 in the present draft because the Commission is dealing only with the rules of international law and the principle of international law with respect to succession of State debt in the uniting of States is clearly set forth in paragraph 1)? In short, by the addition of paragraph 2 as it stands, the whole legal relationship between creditors and debtors, or – looked at from a different angle – between creditors, the successor State, and its component parts to which the State debt is attributed becomes unclear and vague. I do not think it is wise for the Commission to adopt such a provision which entails so much ambiguity.

11. The ambiguity of paragraph 2 may however, be removed by the insertion therein of the phrase "with the consent of the creditors concerned". If the con-

\* Italics supplied by Mr. Tsuruoka.

sent is given, then, one may say that a new contractual relationship is created between the respective component parts concerned of the successor State and the creditors concerned. By virtue of such new relationship, the component parts concerned become new debtors and the successor State would be relieved of the burden of repayment as a debtor. In such a case, the introductory part of paragraph 2, which reads "without prejudice to the foregoing provision", becomes inadequate since paragraph 2 now provides for a new situation. Thus, that part should be reworded to read "Nothing in paragraph 1 excludes the possibility of attributing ...".

12. The second problem relates to the modality of attribution of the State debt. Paragraph 2 as it stands does not specify which part of the State debt should be attributed to which component parts. It simply provides that the State debt must be attributed *in accordance with the internal law of the successor State*. In this connexion, the example given in the Commission in explaining the meaning of paragraph 2 is quite misleading. The example given was that the State debt concerned would be attributed to the component part which had, before the uniting of States, been the debtor State of the State debt concerned. However, paragraph 2 does not provide so. On the contrary, paragraph 2 as at present worded permits the successor State to attribute the State debt to *any* component part in accordance with its internal law.

If the intention of paragraph 2 is to permit this kind of freedom on the part of the successor State, then a question arises as to why the possibility of such attribution is limited to only the component parts of the successor State. Why not a State bank? Why not a government enterprise? In some cases, a State bank or a government enterprise is stronger financially than the component parts of the successor State. In short, paragraph 2 as at present worded is too narrow if its objective is to provide for the freedom of the successor State to attribute the State debt to another entity, and, on the other hand, it is too broad if its objective is to provide for the freedom of the successor State to attribute the State debt to the component part which was the predecessor State responsible for the State debt concerned.

13. For the various reasons stated above, I am not convinced that paragraph 2 of article 23 has any positive meaning in the whole draft articles on succession of States with respect to matters other than treaties. I even fear that it might add to unnecessary confusion in the whole draft. It appears to be wiser therefore if we delete paragraph 2 from article 23 or amend it in the following manner:

2. *Nothing in paragraph 1 excludes the possibility of attributing, with the consent of the creditors concerned, the whole or any part of the State debt of the predecessor States to the component parts of the successor State or to any other entity in accordance with the internal law of the successor State.*



**QUESTION OF TREATIES CONCLUDED BETWEEN STATES  
AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO  
OR MORE INTERNATIONAL ORGANIZATIONS**

[Agenda item 4]

**DOCUMENT A/CN.4/312\***

**Seventh report on the question of treaties concluded between States and international organizations  
or between two or more international organizations,  
by Mr. Paul Reuter, Special Rapporteur**

*Draft articles, with commentaries (continued)\**

[Original: French]  
[1 June 1978]

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\* For the preceding draft articles presented by the Special Rapporteur, see the third, fourth, fifth and sixth reports (*Yearbook ... 1974*, vol. II (Part Two), p. 135, document A/CN.4/279; *Yearbook ... 1975*, vol. II, p. 25, document A/CN.4/285; *Yearbook ... 1976*, vol. II (Part One), p. 137, document A/CN.4/290 and Add.1; *Yearbook ... 1977*, vol. II (Part One), p. 119, document A/CN.4/298, respectively).

## Draft articles with commentaries (continued)

### PART IV. AMENDMENT AND MODIFICATION OF TREATIES

#### General introduction

1. Part IV of the Vienna Convention on the Law of Treaties<sup>1</sup> comprises only three articles: article 39, extremely brief, which states the principle of the amendment of treaties by agreement between the parties; article 40, which concerns the amendment of multilateral treaties; and article 41, which concerns agreements to modify multilateral treaties between certain of the parties only. The last two articles are relatively complicated.

2. Articles 40 and 41 are not unrelated to other provisions of the Convention, in particular to article 30 and the articles concerning the suspension or breach of treaties. Although the sometimes subtle analyses on which they are based taxed the sagacity of the Commission, the United Nations Conference on the Law of Treaties accepted, almost unanimously, the texts prepared by the Commission, subject to only minor drafting changes.

3. Because these two articles apply only to multilateral treaties, the question arises whether they can be extended to treaties concluded between two or more international organizations or between States and international organizations. Although the case of multilateral treaties concluded between international organizations has been considered earlier, particularly in connexion with reservations, this is a fairly rare case, certainly so far as open multilateral treaties are concerned.<sup>2</sup> On the other hand, the case of treaties between States and international organizations suggests another doubt. It is conceivable that a multilateral treaty the parties to which are mainly States may also make provision for the admission of some international organizations as parties on the same footing as States: it was because of this eventuality that the Commission adopted draft article 9, paragraph 2.<sup>3</sup>

2. The adoption of the text of a treaty between States and one or more international organizations at an international conference in which one or more international organizations participate takes place by the vote of two thirds of the participants present and voting, unless by the same majority the latter shall decide to apply a different rule.

In practice, however, some very different examples have come to light of multilateral treaties between States and international organizations, namely,

<sup>1</sup> For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287. The Convention is hereinafter referred to as the "Vienna Convention".

<sup>2</sup> See *Yearbook ... 1977*, vol. II (Part Two), pp. 106–107, document A/32/10, chap. IV, sect. B. 2, article 19, para. 4 of the commentary.

<sup>3</sup> For the text of all the articles adopted so far by the Commission, see *ibid.*, pp. 98 *et seq.*, document A/32/10, chap. IV, sect. B.1.

*closed multilateral treaties the parties to which, while theoretically equal, are yet not in a symmetrical position in relation to each other.*<sup>4</sup> It is a legitimate question therefore whether, where States and international organizations are concerned, account should not be taken of this situation in order to introduce further distinctions which would involve a departure from the simplicity of the provisions of the Vienna Convention.

4. It should be noted, however, that the Vienna Convention, which did not define "multilateral treaty", subordinated all multilateral treaties between States to the same rules, irrespective of the profound differences marking them by reason of their open or closed nature or of the symmetry or asymmetry of the reciprocal positions of the parties. Accordingly, if the provisions, so far as they relate to international organizations, are to depart from the rules laid down by the Vienna Convention for the commitments of States, the reason would be somewhat different, viz. that the capacities of international organizations are regarded as still being limited in nature. Allowance has been made for this view in the draft articles concerning reservations,<sup>5</sup> but it should nevertheless be balanced with the idea that, in a system based on consensus, as is the law of treaties and in particular the Vienna Convention of 1969, the equality of the parties in the rules governing the mechanism and process of consent is fundamental. This is why, as will be explained below, it seemed possible to follow the Vienna Convention very closely in the drafting of articles 39 and 40, whereas article 41 may present some difficulties.

#### Article 39. General rule regarding the amendment of treaties<sup>6</sup>

**A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.**

#### Commentary

(1) The text of the Vienna Convention does not call for any change, not even a drafting change. The rule set forth here is nothing other than the rule *pacta sunt servanda* in another form.

(2) In its commentary to article 35 of its 1966 draft, which became article 39 of the Vienna Convention,<sup>7</sup>

<sup>4</sup> Cf. the examples given in *ibid.*, p. 107, foot-note 454.

<sup>5</sup> *Ibid.*, pp. 105–116, document A/32/10, chap. IV, sect. B.2, articles 19–23bis.

<sup>6</sup> Corresponding provision of the Vienna Convention:

"Article 39. General rule regarding the amendment of treaties

"A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide."

<sup>7</sup> *Yearbook ... 1966*, vol. II, pp. 232–233, document A/6309/Rev.1 (Part II), chap. II, draft articles on the law of treaties with commentaries, articles 35 and 36, para. 4 of the commentary.

the Commission drew attention to the implication of the use of the term "agreement". The use of this very general term means that the principle of the *acte contraire* cannot apply to amendments: whatever the form chosen for a treaty, it may be amended by an agreement in a form other than the original treaty. The reference to Part II of the Vienna Convention merely emphasizes that the Convention has given the utmost flexibility to the various modes of concluding treaties.

(3) If as regards the present draft articles reference is made to the draft articles which have adapted Part II of the Vienna Convention to treaties concluded between States and international organizations or between two or more international organizations, it will be seen that the flexibility of the provisions of the Vienna Convention is unchallenged and is fully safeguarded in the present draft articles. It is perfectly reasonable therefore to propose for draft article 39 the language of the corresponding provision in the Vienna Convention.

*Article 40. Amendment of multilateral treaties<sup>8</sup>*

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States and international organizations, each one of which shall have the right to take part in:

(a) the decision as to the action to be taken in regard to such proposal;

(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State and every organization entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State or international organization already a party to

<sup>8</sup> Corresponding provision of the Vienna Convention:

*Article 40. Amendment of multilateral treaties*

"1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

"2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

"(a) the decision as to the action to be taken in regard to such proposal;

"(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

"3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

"4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such State.

"5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

"(a) be considered as a party to the treaty as amended; and

"(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such State or organization.

5. Any State or organization which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State or organization:

(a) be considered as a party to the treaty as amended; and

(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

*Commentary*

Except for drafting changes made necessary by its purpose, the text of draft article 40 is the same as that of article 40 of the Vienna Convention.

*Article 41. Agreements to modify multilateral treaties between certain of the parties only<sup>9</sup>*

*Variant I*

1. Two or more of the parties to a multilateral treaty between international organizations may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Two or more States parties to a treaty between States and one or more international organizations may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

3. One or more States and one or more international organizations parties to a treaty between States and international organizations may include

<sup>9</sup> The corresponding provision of the Vienna Convention is given as variant II.

an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) it is so agreed between all parties to the treaty.

4. Unless, in the case provided for in subparagraph (a) of paragraphs 1, 2 and 3, the treaty stipulates otherwise, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modifications made in the treaty by the agreement.

### Variant II

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

### Commentary

(1) Two variants of draft article 41 are submitted to the Commission.

(2) Variant I takes into account the idea that organizations, being different in nature from States, should in their relations *with States* be the subject of special provisions by reason of their nature. In keeping with this reasoning, it is agreed that treaties concluded between two or more international organizations should be subject to the same rules as treaties between States; this is the purpose of paragraph 1 of variant I. Consequently only a slight drafting change is made in the text of article 41, paragraph 1, of the Vienna Convention.

(3) However, when one comes to deal with the case of treaties concluded between States and international organizations, a distinction has to be drawn between two situations, which are, respectively, the subject of paragraphs 2 and 3. If the *inter se* agreement concerns only States (paragraph 2) the applicable rule, as in the case of paragraph 1, is drafted in the same terms as the corresponding provision of the Vienna Convention, subject to only one change: the paragraph applies to treaties concluded between "States and one or more international organi-

zations". On the other hand (paragraph 3), if the *inter se* agreement is to include as a party at least one international organization (*inter se* agreement between several international organizations, *inter se* agreement between a State and one or more international organizations, *inter se* agreement between several States and one or more international organizations), a stricter rule applies than in the previous cases: in order to be lawful, such an agreement must be authorized by the treaty or receive the consent of all parties to the treaty. The reason for this stricter rule is that the participation of international organizations in a multilateral agreement must of necessity have been carefully weighed by the negotiators, who must normally, therefore, have considered the problem and, where appropriate, have authorized such *inter se* agreements. Another case to be envisaged, however, is that where the original treaty did not contemplate the eventuality of such *inter se* agreements but where, after the entry into force of the treaty, all the parties give their consent to the conclusion of such an *inter se* agreement. In such a situation, there is probably a good deal to be said in favour of admitting the possibility of such an agreement. That is the object of paragraph 3 (b); the wording "it is so agreed between all parties to the treaty" is very flexible and the idea is expressed in very many provisions of the Vienna Convention (articles 10 (a), 11, 12, para. 1(b), 12, para. 2(a), 13(b), etc.) It indicates that, while the consent of all parties is essential, it may be signified in any form whatsoever.

(4) Variant II reproduces textually article 41 of the Vienna Convention. It is one of those rare articles of the Convention that do not require even a drafting change.

(5) Acceptance of this provision is based on the following considerations. Already when dealing with treaties between States, the Commission was extremely cautious as regards *inter se* agreements. This article lays down three cumulative conditions<sup>10</sup> but, as the Commission recognized, these three conditions largely overlap. For example, a modification affecting the enjoyment by the other parties of their rights or the performance of their obligations may be said to be implicitly prohibited by the treaty.<sup>11</sup> Similarly, such a modification may also be said to conflict with "the effective execution of the object and purpose of the treaty as a whole". These multiple precautions raise a solid barrier against modifications that endanger the implementation of the treaty; they are extended to the treaties forming the subject of the present draft article. They are obviously adequate to

<sup>10</sup> The three conditions were presented as such in draft article 37; paragraph 1(b) of that article spelt out the three conditions, listing them as (i), (ii) and (iii). Through a mere drafting change, the United Nations Conference on the Law of Treaties dropped the third condition as it had appeared in the former article 37, paragraph 1(b)(iii), and integrated it in subparagraph (b) of article 41.

<sup>11</sup> See *Yearbook ... 1966*, vol. II, p. 235, document A/6309/Rev.1 (part II), draft articles on the law of treaties with commentaries, commentary to article 37, para. (2).

rule out any modifications which would affect the relations of two or more organizations *inter se* or the relations of one or more international organizations and one or more States and which would give rise to the apprehension that they would upset the balance achieved by the treaty. In a case in which the treaty has laid down special rights and obligations, or even special treaty status, for one or more organizations, any modification of the situation will be at variance with the strict conditions laid down in article 41 and prevent the conclusion of the agreement.

(6) In actual fact, variants I and II differ in principle rather than in their technical rules. By adopting a circumspect approach to international organizations, variant I raises a kind of presumption which is rebuttable only by the consent of all the States parties: modifications affecting international organizations are assumed *a priori* to upset the balance

established by the treaty. Variant II merely prohibits those modifications that upset the balance of the treaty.

(7) If the two variants are considered from the point of view of the distinction drawn between open multilateral treaties and restricted multilateral treaties (art. 9, art. 20, para. 2, of the Vienna Convention), it will be seen that in both cases the rules of article 41 are adequate: if international organizations are placed on the same footing as States in the context of an open treaty, there is no reason why they should be subject to rules other than those applicable to States. On the other hand, so far as more or less restricted multilateral treaties are concerned, the conditions laid down by the Vienna Convention for agreements between States are so strict that there are no sound reasons for visualizing stricter ones when international organizations are involved.



**THE LAW OF THE NON-NAVIGATIONAL USES  
OF INTERNATIONAL WATERCOURSES**  
(Agenda item 5)

**DOCUMENT A/CN.4/314**

**Replies of Governments to the Commission's questionnaire**

[Original: English/Arabic]  
[23 June 1978]

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## Introduction

1. By paragraph 4 (e) of section I of resolution 3315 (XXIX) of 14 December 1974, the General Assembly recommended that the International Law Commission should continue its study of the law of the non-navigational uses of international watercourses, taking into account General Assembly resolutions 2669 (XXV) of 8 December 1970 and 3071 (XXVIII) of 30 November 1973 and other resolutions concerning the work of the Commission on the topic, and comments received from Member States on the questions referred to in the annex to chapter V of the report of the Commission on the work of its twenty-sixth session.<sup>1</sup> Comments received from Member States pursuant to resolution 3315 (XXIX) were issued in document A/CN.4/294 and Add. 1.<sup>2</sup>

2. By paragraph 5 of its resolution 31/97 of 15 December 1976, the General Assembly urged Member States that had not yet done so to submit to the Secretary-General their written comments on the subject of the law of the non-navigational uses of international watercourses.

3. By a circular note dated 18 January 1977, the Secretary-General invited Member States that had not yet done so to submit as soon as possible their written comments referred to in resolution 31/97.

4. As at 1 June 1978, substantive replies to the above-mentioned note had been received from the Governments of the following Member States: Libyan Arab Jamahiriya, Sudan, Swaziland and Yemen.

5. The present document has been organized along the same lines as document A/CN.4/294 and Add. 1, that is, it contains the replies mentioned in the preceding paragraph, giving first the general comments and observations and then the replies to each of the specific questions reproduced below. When the text of a reply appears to cover more than one question, the reply has been reproduced only once, under the first relevant question, cross-references being used under the others.

6. The text of the questionnaire is as follows:

- A. What would be the appropriate scope of the definition of an international watercourse, in a study of the legal aspects of fresh water uses on the one hand and of fresh water pollution on the other hand?
- B. Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of non-navigational uses of international watercourses?
- C. Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of the pollution of international watercourses?
- D. Should the Commission adopt the following outline for fresh water uses as the basis of its study:
  - (a) Agricultural uses:
    1. Irrigation;
    2. Drainage;

3. Waste disposal;
4. Aquatic food production;
- (b) Economic and commercial uses:
  1. Energy production (hydroelectric, nuclear and mechanical);
  2. Manufacturing;
  3. Construction;
  4. Transportation other than navigation;
  5. Timber floating;
  6. Waste disposal;
  7. Extractive (mining, oil production, etc.);
- (c) Domestic and social uses:
  1. Consumptive (drinking, cooking, washing, laundry, etc.);
  2. Waste disposal;
  3. Recreational (swimming, sport, fishing, boating, etc.)?
- E. Are there any other uses that should be included?
- F. Should the Commission include flood control and erosion problems in its study?
- G. Should the Commission take account in its study of the interaction between use for navigation and other uses?
- H. Are you in favour of the Commission taking up the problem of pollution of international watercourses as the initial stage in its study?
- I. Should special arrangements be made for ensuring that the Commission is provided with the technical, scientific and economic advice which will be required, through such means as the establishment of a Committee of Experts?

## I. GENERAL COMMENTS AND OBSERVATIONS

### Libyan Arab Jamahiriya

[Original: Arabic]  
[17 May 1977]

### *Study of the various aspects of the topic*

The land surface of a State's territory comprises plains, wadis, deserts, elevations, hills and mountains, which form the dry component, and canals, lakes and rivers, which form the aqueous elements. These natural phenomena may lie within the boundaries of the State's territory, and in this case they form a part of this territory and the State exercises over all of them in law the same rights which the State exercises over its territory. Some of these phenomena may themselves constitute the boundaries of the State's territory, while some may extend to territories belonging to more than one State. This latter case is the topic of study with regard to watercourses and wherever natural geographic features extend beyond the territory of one or more States. In international law, concern is restricted to the legal situation with regard to the use of rivers and the rights and obligations of the States through whose territory a river passes.

[See also below, p. 256, sect. II, question A, Libyan Arab Jamahiriya.]

<sup>1</sup> Yearbook ... 1974, vol. II (Part One), pp. 301-304, document A/9610/Rev.1.

<sup>2</sup> Yearbook ... 1976, vol. II (Part One), p. 147.

*State entitlement to use the waters of an international river: basis of right and source of obligation*

With regard to defining the positions of States traversed by international river water systems insofar as their rights to utilize them and their commitments to one another are concerned, the provisions of international law appear scanty and lacking in exactitude and precision of detail. There are three main prevailing theories on this subject:

(1) *Theory of absolute territorial sovereignty*

The adherents of this theory maintain that every State has the full right to exercise over the portion of an international watercourse which passes through its territory all the rights deriving from its absolute sovereignty over its territory unrestrictedly and unconditionally. It follows from this that a State has an absolute right to establish such legislation as it sees fit for the utilization of the waters passing through its territory in the portion of an international river lying within its frontiers, of whatever kind such legislation may be and whatever effects and consequences it may have for other bordering and neighbouring States into whose territory the course of the international river extends. It is clear that this theory is adhered to firmly only by those States within whose territory the upper reaches of an international river are located, i.e., those States where the source of a river or the portion of the river close to the source is situated, because they have a primary interest in utilizing the waters of the river without being affected by injury arising out of practical adherence to this theory. Perhaps the criticism which demolishes the theory fundamentally is that it equates the land component of territory, which is the staple component, with the water component, which is a mobile component, so that despite their difference in character, both components are subject to one legal rule based on the principle of absolute territorial sovereignty.

(2) *Theory of absolute territorial unity*

The adherents of this theory maintain that a State through whose territory an international river runs is fully entitled to use the water flow of the river as the need arises within its territory with regard to water quantity and quality, because the whole river, from the source to the outlet, is a territorial unit which cannot be divided up by political boundaries. The State cannot exercise absolute sovereignty over the portion of the watercourse which passes through its territory. Rather, the sovereignty which it may exercise over this portion is a sovereignty restricted by the obligation not to interfere with the natural course of the river, and a State may not within its territory change the course of the river or impede the flow of its water to the territory of other States within whose territory the river basin lies. A State may not increase or decrease the flow of river water by artificial

means. In other words, every State is entitled to make use of the waters of the portion of the river which traverses its territory, provided that there is no injury to the rights of the other States through whose territory the river passes. This theory is supported by the majority of international jurists, although they differ regarding the term which they apply to it. It seems clear that this theory establishes a kind of equilibrium between the interests of the various States which the river traverses and prevents any one of them from taking arbitrary action affecting the course and waters of the river in a way detrimental to the rights of the others.

(3) *Joint ownership theory*

This theory is based on the principle that the whole river, from the source to the outlet, is to be regarded as the joint property of all the States through whose territory the river passes, their rights being equal and integral, and no single one of them being exclusively entitled, without the agreement of the other States, to establish legislation for the utilization of the river waters in the portion of the river passing through their territory, where such utilization affects the flow of the river waters, whether by increasing or decreasing them. This theory does not have many adherents among jurists and, furthermore, it has not been reflected in inter-State practice, especially in modern times, when the interests of States differ and conflict, making their utilization of water on the basis of joint ownership a remote possibility.

*The Jamahiriya's opinion on these theories*

However, these three theories have been subject to change, and modern opinion has inclined towards the adoption of improved principles of modern international law which have gained almost unanimous acceptance in legal theory and practice. A State whose territory an international river water system traverses has towards the other States whose territory the river traverses reciprocal rights with regard to water use and mutual obligations with regard to the requirement to respect acquired rights and historical usage rights regarding these waters and to refrain from any action which might be detrimental to the established rights of others.

International responsibility unquestionably lies with any of the States which commits an act injurious to another State, whether deliberately or by error and negligence.

Finally, the question of the distribution of waters among riparian States and the non-navigational uses of these waters must be guided by the principle of equity and equilibrium between the different interests.

[See also below, p. 258, section II, question D, Libyan Arab Jamahiriya.]

## II. REPLIES TO SPECIFIC QUESTIONS

### Question A

*What would be the appropriate scope of the definition of an international watercourse, in a study of the legal aspects of fresh water uses on the one hand and of fresh water pollution on the other hand?*

Libyan Arab Jamahiriya

[Original: Arabic]  
[17 May 1977]

#### *The various definitions and terminology of international watercourses*

It emerges from all the discussions which have taken place at sessions of the General Assembly and those mentioned in the report of the International Law Commission on its twenty-eighth session<sup>3</sup> concerning the law of the non-navigational uses of international watercourses, and from the agreements and treaties referred to in that report, that varying terminology and definitions have been used to express the concept "international watercourse". These are as follows: river basin, drainage basin, international drainage basin, successive or contiguous international rivers.

In view of the numerous differences of opinion on this point, the Commission concluded, on the basis of the views expressed by some States, that there was no reason why the differences of opinion should be any obstacle or grounds for deferring the establishment of objective rules relating to the legal aspects.

Initially, jurists agreed to apply the term "international river" to rivers traversing the territories of two or more States, but a new term replaced the first one, namely, "international water system".

#### *The Jamahiriya's comments and opinion on these definitions*

The Jamahiriya feels that this definition – or all the terminology – is lacking in clarity and precision of expression. The term "river basin" is an incomplete term which may be applied to a river whose basin does not extend beyond the territory of one State, and this definition or term does not indicate the international character implying the extension of the river waters to the territory of one or more other States.

The term "drainage basin" is vague. The term "basin" is vague. A "basin" may contain anything, and the term may be applied to a water basin which is not flowing or extended, i.e., to any body of confined water. The waters of a river are used for various purposes, and there are no grounds for qual-

ifying the term "basin" by the term "drainage", and the same criticism applies to the term "international drainage basin".

The term "successive international rivers" or "contiguous international rivers" requires clarification, because the waters of a river may be contiguous and successive in its course, while remaining within the boundaries of one territory and not extending beyond it to the territory of another State.

The new term, namely, "international water system", likewise requires further definition. The word "water" is a general term which may be applied to the waters of a river or the waters of a sea, and the Jamahiriya therefore considers that this new term requires to be made more specific and suggests that it should be further restricted within the concept of the "international river water system". The appropriateness of this proposed term is clear from the following.

It has clarity of expression, for it implies the regulation and utilization of water, whether this regulation be specific or confined to the waters of rivers exclusively, and also implies the use or regulation at the international level, i.e., it applies to waters which are interconnected in a natural basin where any portion of such waters extends over the territory of two or more States.

#### *Scope and range of the proposed definition*

This definition covers the principal watercourse and also its tributaries, whether contributory or distributary. A consensus has been reached by international jurists that a river basin must be defined so that the term "basin" covers the natural geographic unit which forms the course of its waters and determines the quantity and quality of these waters, the control of the water flow and the character of their regulation, regardless of the volume of the waters or their proximity to or remoteness from established international frontiers. In modern jurisprudence, it suffices, for the purposes of international law, that one of a river's tributaries should be international in order for the river basin to be considered international. There is no reason to exclude successive or contiguous rivers from the scope of the definition of the term "international river water system", provided that the waters of these rivers traverse more than one State.

The Jamahiriya considers it is essential to start with the definition of the concept of international watercourses and to establish a unified terminology for it that is in line with modern international jurisprudence and the principles of international law which have been accepted by a consensus of jurists and legists. This definition or term is the necessary starting point for a study of the topic, and it is impermissible to embark on a study of a topic with all its ramifications before agreeing on its title and terminology.

The Jamahiriya considers that the term "international river water system" is a comprehensive and

<sup>3</sup> *Ibid.*, vol. II (Part Two), p. 153, document A/31/10, chap. V.

unambiguous definition having greater precision of meaning and a greater clarity of expression than any other term.

**Sudan**

[Original: Arabic/English]  
[12 September 1977]

An international watercourse can be defined as a watercourse which is used by all countries for all purposes – other than war – through law enforcement or by agreements with the country through which the watercourse passes.

**Swaziland**

[Original: English]  
[9 March 1977]

The definition of an international watercourse should be a watercourse which crosses boundaries between two or more States or forms a boundary between such States.

**Yemen**

[Original: English]  
[13 July 1977]

An international watercourse, for the purposes of a study on fresh water uses and pollution, may be defined as a watercourse which is subject, directly or indirectly, to use or pollution by two or more States.

**Question B**

*Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of non-navigational uses of international watercourses?*

**Libyan Arab Jamahiriya**

[See above, p. 256, sect. II, question A, Libyan Arab Jamahiriya.]

**Swaziland**

[Original: English]  
[9 March 1977]

Yes.

**Yemen**

[Original: English]  
[13 July 1977]

*Reply to questions B and C*

The geographical concept of an international drainage basin may be an appropriate basis for a study of the legal aspects of the non-navigational pollution of international watercourses; but the concept has little relevance to their use, inasmuch as, in the state of present-day knowledge, it is unlikely to be gainfully utilized, except in conditions which are likely to be complicated, for example, in the field of waste disposal.

**Question C**

*Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of the pollution of international watercourses?*

**Libyan Arab Jamahiriya**

[See above, p. 256, , sect. II, question A, Libyan Arab Jamahiriya.]

**Swaziland**

[Original: English]  
[9 March 1977]

Yes.

**Yemen**

[See above, p. 257, sect. II, question B, Yemen.]

**Question D**

*Should the Commission adopt the following outline for fresh water uses as the basis of its study:*

(a) *Agricultural uses:*

1. *Irrigation;*
2. *Drainage;*
3. *Waste disposal;*
4. *Aquatic food production;*

(b) *Economic and commercial uses:*

1. *Energy production (hydroelectric, nuclear and mechanical);*
2. *Manufacturing;*
3. *Construction;*
4. *Transportation other than navigation;*
5. *Timber floating;*
6. *Waste disposal;*
7. *Extractive (mining, oil production, etc.);*

(c) *Domestic and social uses:*

1. *Consumptive (drinking, cooking, washing, laundry, etc.);*
2. *Waste disposal;*
3. *Recreational (swimming, sport, fishing, boating, etc.)?*

## Libyan Arab Jamahiriya

[Original: Arabic]  
[17 May 1977]

*Uses of international rivers*

International river waters are used for non-navigational purposes in various ways which cannot be listed exhaustively for two reasons:

Firstly, these uses differ according to the States concerned and the extent of their needs and also according to their geographical location, economic and social situation and cultural progress. The uses or activities deemed appropriate by one State may not be considered in the same light by another State bordering on it. The one may be concerned about energy and the production of electricity from waterfalls and the industrial prospects ensuing therefrom, while the other may be concerned about lowland agriculture, irrigation and livestock and the resultant manufacture of dairy products, etc.

Secondly, the uses differ and change with the passage of time. The uses deemed appropriate by a State today may be replaced by a variety of others tomorrow.

We only mention the following uses and activities by way of example and explanation. This is not meant to be an exhaustive list and is subject to additions and deletions dictated by differences of viewpoint according to time and place:

(1) Industrial uses, the most important being energy production. Electricity is produced from declivities and waterfalls, and where energy is found, various forms of industry are established.

(2) Mining. Some minerals are extracted from the river's depths or oil may be obtained from the river bed.

(3) Agricultural uses. These uses are connected with irrigation, drainage, plant and crop cultivation, stock-raising deriving from this, dairy products and the wool and hair products on which the weaving industry is based.

(4) Nutritional uses. These are derived from the preceding category. Stock-raising helps to provide meat and dairy products, and there is also the question of optimizing the fish stock living and breeding in the river waters.

(5) Domestic and social uses. Water is necessary for human life, inasmuch as it is essential for drinking, nutrition and cleanliness.

(6) Recreational and sports uses. Portions of a river are used for sports, such as swimming, fishing and boat racing, as well as for other recreational pursuits.

*Problems relating to the non-navigational uses  
of international watercourses*

The use of international river waters was originally confined to drinking, irrigation and drainage, but

subsequently developed into use for energy production and the supplying of various industries. There then arose a conflict of interests between the States on the upper reaches, the States on the middle reaches and the States on the lower reaches of one and the same river, and, in many cases, there were difficulties involved in the conclusion between the States concerned of agreements and treaties to establish an equilibrium between the different interests and aspirations, to reconcile them and to achieve various goals. Thus, problems arose with regard to the non-navigational use of international river waters, some of them arising out of deliberate intent on the part of a State and others being the result of error and negligence. We mention below some of these problems and difficulties by way of example:

(1) The causing of water pollution. Pollution is caused by refuse disposal or the infiltration of substances and liquids harmful to human or other terrestrial or aquatic animal life, which may be destroyed; pollution may also cause human bodily defects. Factories may get rid of their refuse by dumping it in a river, or a State may deliberately pollute water in order to injure a neighbouring State or to destroy its economic assets and its resources or its very existence.

(2) An endeavour by a State to make changes in the region where a river traverses its frontiers to pass into the territory of a neighbouring State.

(3) A State's alteration of the natural character of the waters in a way detrimental to other States.

(4) The undertaking by a State of public works on its territory which lead to the flooding of the river in the territory of another State.

(5) A State's arbitrary use or blocking of the waters of a river to a degree which produces a drop in the natural level of the river in a neighbouring State.

(6) The undertaking by a State of any operation which may lead to the suspension or obstruction of navigation on the river.

*The Jamahiriya's opinion on how to deal with  
and eliminate these problems*

The Jamahiriya considers that international positive norms concerning the use of international river waters should derive from the agreements concluded between the States through whose territories the river waters flow. A number of agreements on this topic have been concluded setting forth the respective rights and obligations of States on the lower reaches of a river and those on the upper reaches. The aim of these agreements is usually to establish an equilibrium between the various, and sometimes conflicting, interests.

In all cases, international responsibility unquestionably lies with any of these States which changes a watercourse in a way injurious to other States, whatever the degree of the injury caused.

This same principle applies wherever the kind of water use and method of water exploitation gives rise to such injury, and it is on this basis that international responsibility is apportioned in any of the instances mentioned above under the heading "Problems relating to the non-navigational uses of international watercourses".

It is not possible to define and list exhaustively the uses of international river waters because they vary according to States' circumstances, geographical location and economic situation and decrease or increase with the passage of time.

#### Sudan

[Original: Arabic/English]

[12 September 1977]

Irrigation should be the basis of study by the Commission since it is the means of providing food for the world. Accordingly, energy production is also important for the development of the world.

Transportation other than navigation has to be specified and restricted and controlled in such a manner as to keep the river course navigable and safe for the type of vessels used for transportation on that river and to provide safeguards against any risks or damage to navigation signs, beacons, routes and harbours. Bridges and dams should be built taking due account of the dimensions of vessels, so as not to impede free passage.

With reference to question D (b) 7, concerning extractive uses such as mining and oil production, we would like to add that the Government of the Democratic Republic of the Sudan is engaged in extensive activities in the field of the extraction of petroleum and natural gas and of mineral concentrates on the shores and bed of the Red Sea.

In recent years, the State has concluded numerous agreements with many petroleum companies for oil prospecting and extraction on the shores of the Red Sea. Many of these agreements are still in effect and prospecting continues.

The Government of Sudan is greatly concerned with the question of the extraction and exploitation of Red Sea mineral concentrates, and the State has entered into joint agreements with the Kingdom of Saudi Arabia for the exploitation of these raw materials.

#### Swaziland

[Original: English]

[9 March 1977]

Item (b). 3. *Construction*. Does this include storage dams, barrages, etc. which can alter the flow regime of a river? We should think so.

Item (b). 4. *Transportation other than navigation*. The meaning of this is not clearly understood. All transportation on a watercourse would surely be navigation.

#### Yemen

[Original: English]

[13 July 1977]

*Item a. Agricultural uses*: Aquatic food production does not properly belong to agricultural uses, and should be dealt with separately. The other categories listed under this heading are correct.

*Item b. Economic and commercial uses*: Transportation other than navigation should be omitted from this list of uses. The other categories are acceptable.

*Item c. Domestic and social uses*: Recreational aspects should not appear under this heading. The two remaining categories may stand.

#### Question E

*Are there any other uses that should be included?*

#### Libyan Arab Jamahiriya

[See above, p. 258, sect. II, question D, Libyan Arab Jamahiriya.]

#### Sudan

[Original: Arabic/English]

[12 September 1977]

Rivers in nearly all countries are used for many purposes besides navigation and transportation. It is of great importance for the Commission to take into account their navigational use in relation to uses such as the construction of dams and bridges on them, the generation of hydro-electric power, the production of drinking water, irrigation or the operation or various industrial plants.

#### Swaziland

[Original: English]

[9 March 1977]

It is considered that flood control should be included.

#### Yemen

[Original: English]

[13 July 1977]

The list is fairly exhaustive.

#### Question F

*Should the Commission include flood control and erosion problems in its study?*

**Sudan**

[Original: Arabic/English]  
[12 September 1977]

The Commission should include flood control and erosion problems in its study, because flood protection is vital to safeguard life and property and protection against erosion will keep the watercourse continuously suitable for all uses.

**Swaziland**

[Original: English]  
[9 March 1977]

Yes.

**Yemen**

[Original: English]  
[13 July 1977]

Flood control and erosion problems form a vast subject in themselves, highly technical, and should be the subject of a separate study by a special commission.

**Question G**

*Should the Commission take account in its study of the interaction between use for navigation and other uses?*

**Sudan**

[Original: Arabic/English]  
[12 September 1977]

We recommend that the Commission take account of interaction between the use of watercourses for navigation and other uses. We suggest the consideration of the following:

(1) In the building of dams, bridges, etc., account should be taken of the necessity of free passage for vessels and their dimensions i.e., bridge span and height, size of dam locks, etc.;

(2) Water pollution or contamination should be prohibited in rivers usually used for drinking and irrigation;

(3) Dams and hydro-electric power installations should not impede the navigable course of the river (course depth, width).

We draw attention to the four types of rivers:

(a) A river that is wholly inside one country;

(b) A river that passes from one country to another through one border;

(c) A river that passes along the borders of two neighbouring countries (the river being the border);

(d) A river that passes through one country from point A to point B and during its course between A and B passes wholly into another neighbouring country, or winds from one country to another.

**Swaziland**

[Original: English]  
[9 March 1977]

Yes.

**Yemen**

[Original: English]  
[13 July 1977]

Navigational and other uses necessarily react on each other, and this subject-matter should be included in the study.

**Question H**

*Are you in favour of the Commission taking up the problem of pollution of international watercourses as the initial stage in its study?*

**Libyan Arab Jamahiriya**

[Original: Arabic]  
[17 May 1977]

In the Jamahiriya's opinion, the problem of pollution should take precedence in the study, because of its gravity and its appalling consequences, which may include the destruction and annihilation of human life, in addition to other drawbacks and dangers to health; it is perhaps unnecessary to mention the fact that the use of a thing presupposes its initial cleanliness and wholesomeness.

**Swaziland**

[Original: English]  
[9 March 1977]

Yes.

**Yemen**

[Original: English]  
[13 July 1977]

Yes.



**Question I**

*Should special arrangements be made for ensuring that the Commission is provided with the technical, scientific and economic advice which will be required, through such means as the establishment of a Committee of Experts?*

**Libyan Arab Jamahiriya**

[Original: Arabic]  
[17 May 1977]

With regard to the question whether special arrangements should be made for ensuring that the Commission is provided with technical, scientific and economic advice, the Jamahiriya considers that it would be appropriate to establish a committee of experts on the various legal, cultural, economic and other aspects of the topic, to collaborate with the Commission, following the precedent of the Committee of Experts established to assist the Commission in studying some aspects of the law of the sea and related agreements.

**Sudan**

[Original: Arabic/English]  
[12 September 1977]

Technical, scientific and economic advice are important for the Commission to fulfil its task.

**Swaziland**

[Original: English]  
[9 March 1977]

There is probably no need for a committee of experts, but the Commission should be empowered to call on the services of specialized consultants as required.

**Yemen**

[Original: English]  
[13 July 1977]

Technical, scientific and economic advice for the International Law Commission would be essential for the proper discharge of its functions.



**RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS  
(SECOND PART OF THE TOPIC)**

[Agenda item 7]

**DOCUMENT A/CN.4/311 and ADD.1**

**Second report on the second part of the topic of relations between States  
and international organizations**

**by Mr. Abdullah El-Erian, Special Rapporteur**

[Original: English]  
[18 May and 13 July 1978]

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## ABBREVIATIONS

ASEAN	Association of South East Asian Nations
CMEA	Council for Mutual Economic Assistance
ECSC	European Coal and Steel Community
EEC	European Economic Community
EFTA	European Free Trade Association
ESCAP	Economic and Social Commission for Asia and the Pacific
IAEA	International Atomic Energy Agency
I.C.J.	International Court of Justice
<i>I.C.J. Reports</i>	<i>I.C.J. Reports of Judgments, Advisory Opinions and Orders</i>
OAS	Organization of American States
OAU	Organization of African Unity
OPEC	Organization of Petroleum Exporting Countries
SEATO	South-East Asia Treaty Organization
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
WHO	World Health Organization

## CHAPTER I

**The basis of the present report**

1. The International Law Commission divided its work on the topic "Relations between States and international organizations" into two parts, concentrating first on that part of the topic relating to the status, privileges and immunities of representatives of States to international organizations. The draft articles which it adopted at its twenty-third session in 1971 on this part of the topic were referred by the General Assembly to a diplomatic conference. That conference met in Vienna in 1975 and adopted the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.<sup>1</sup>

2. At its twenty-eighth session in 1976, the Commission reverted to the remaining second part of the topic. At that session, it requested the Special Rapporteur on the topic to prepare a preliminary report to enable it to take the necessary decisions and to define its course of action on the second part of the topic of relations between States and international organizations, namely, "the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities who are not representatives of States".<sup>2</sup>

3. At the twenty-ninth session of the Commission in 1977, the Special Rapporteur submitted a preliminary

report on the second part of the topic of relations between States and international organizations.<sup>3</sup> The report consisted of five chapters. Chapter I described the background of the preliminary study and defined its scope. Chapter II traced the evolution of the international law relating to the legal status and immunities of international organizations. Chapter III analysed recent developments in the field of relations between States and international organizations which had occurred since the adoption by the Commission in 1971 of its draft articles on the first part of the topic of relations between States and international organizations and which had a bearing on the subject matter of the report. Chapter IV of the report dealt with a number of general questions of a preliminary character. They included: the place of custom in the law of international immunities; differences between inter-State diplomatic relations and relations between States and international organizations; legal capacity of international organizations; and scope of privileges and immunities, and uniformity or adaptation of international immunities. Chapter V contained a series of conclusions and recommendations.

4. The Commission discussed the preliminary report at its 1452nd, 1453rd and 1454th meetings, held on 4, 5 and 6 July 1977. Among the questions raised in the course of the discussion were: the need for an analysis of the practice of States and international organizations in the field of international immunities and its impact on the United Nations system; the

<sup>1</sup> *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207. The Convention is hereafter referred to as the "1975 Vienna Convention".

<sup>2</sup> *Yearbook ... 1976*, vol. II (Part Two), p. 164, document A/31/10, para. 173.

<sup>3</sup> *Yearbook ... 1977*, vol. II (Part One), p. 139, document A/CN.4/304.

need to study the internal law of States regulating international immunities; the possibility of extending the scope of the study to all international organizations, whether universal or regional; the need to take account of the particularities of diplomatic law in its application to relations between States and international organizations; and the need to reconcile the functional requirements of international organizations and the security interests of host States.

5. Furthermore, the Special Rapporteur, in his preliminary report, indicated his belief that:

Bearing in mind that many years have elapsed since the preparation of the replies by the United Nations and the specialized agencies to the questionnaire addressed to them by the Legal Counsel of the United Nations ... it would be useful if the United Nations and the specialized agencies were requested to provide the Special Rapporteur with any additional information on the practice in the years following the preparation of their replies.<sup>4</sup>

In the same paragraph, he also stated that "such information would be particularly helpful in the area of the category of experts on missions for, and of persons having official business with, the organization". He further pointed out that another area in which information was needed was that relating to resident representatives and observers who might represent or be sent by one international organization to another international organization.

6. At its 1454th meeting, the Commission decided to authorize the Special Rapporteur to continue with his study on the lines indicated in his preliminary report and to prepare a further report on the second part of the topic of relations between States and international organizations, having regard to the views expressed and the questions raised during the debate at the twenty-ninth session. The Commission also agreed to the Special Rapporteur seeking additional information and expressed the hope that he would carry out research in the normal way, including investigations into the agreements and practices of international organizations, whether within or outside the United Nations family, and also the legislation and practice of States.<sup>5</sup>

7. By paragraph 6 of its resolution 32/151 of 19 December 1977, the General Assembly endorsed "the conclusions reached by the International Law Commission regarding the second part of the topic of relations between States and international organizations".

8. As recalled in the preliminary report of the Special Rapporteur,<sup>6</sup> in order to assist the Commission in its work on the topic relations between States and international organizations, the Legal Counsel of the United Nations, by a letter dated 5 January 1965, requested the legal advisers of the specialized agencies and IAEA to submit replies to two questionnaires: one on the status, privileges and immunities of representatives of member States to

specialized agencies and IAEA; the other on the status, privileges and immunities of these organizations other than those relating to representatives. On the basis of the thorough and helpful replies received as well as of materials gathered by the United Nations Office of Legal Affairs, the Secretariat prepared a study entitled "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities".<sup>7</sup>

9. By a letter dated 13 March 1978 addressed to the heads of the specialized agencies and IAEA respectively, the Legal Counsel of the United Nations stated that:

To assist the Special Rapporteur and the Commission, the United Nations Secretariat at Headquarters has undertaken to examine its own files and to collect materials on the practice of the Organization regarding its status, privileges and immunities during the period from 1 January 1966 to the present. Furthermore, you will find enclosed a questionnaire, largely identical to the relevant one sent in 1965, which is aimed at eliciting information concerning the practice of the specialized agencies and IAEA additional to that submitted previously, namely, information on the practice relating to the status, privileges and immunities of the specialized agencies and IAEA, their officials, experts and other persons engaged in their activities not being representatives of States.

10. Furthermore, the Legal Counsel pointed out in this letter:

As in 1965 the questionnaire closely follows the structure of the Convention on the Privileges and Immunities of the Specialized Agencies. This format was chosen to make possible a uniform treatment of the material by all the specialized agencies, and to facilitate comparisons between their replies. It should be emphasized however, that the additional information sought by the Special Rapporteur under his mandate from the Commission relates not only to the Specialized Agencies Convention – or, in the case of the IAEA, the Agreement on the Privileges and Immunities of the IAEA – but equally to the constituent treaties of the agencies, the agreements with host Governments regarding the headquarters of the agencies, and relevant experience of the agencies concerning the implementation in practice of these international instruments. Any relevant material derived from these sources should be analysed and described under the appropriate sections of the questionnaire.

The questionnaire attempts to indicate the principal problems which, so far as we know, have arisen in practice, but our information may not be complete and consequently the questions may not be exhaustive of the subject. If problems which are not covered by the questionnaire have arisen in your organization during the period under consideration and you think they should be brought to the attention of the Special Rapporteur, you are requested to be good enough to describe them in your replies. Also the questionnaire was designed for all the specialized agencies, and its terminology may not be completely adapted to your organization; we would be obliged, however, if you would be kind enough to apply the questions to the special position of your organization in the light of their purpose of eliciting all information which will be useful to the International Law Commission.

It is hoped that the replies will not be limited to short answers to the questions, but that, so far as useful and possible, you will furnish materials in relation to your organization – including reso-

<sup>4</sup> *Ibid.*, p. 155, para. 78.

<sup>5</sup> *Yearbook ... 1977*, vol. II (Part Two), p. 127, document A/32/10, paras. 94–95.

<sup>6</sup> *Yearbook ... 1977*, vol. II (Part One), p. 141, document A/CN.4/304, para. 6.

<sup>7</sup> *Yearbook ... 1967*, vol. II, p. 154, document A/CN.4/L.118 and Add.1 and 2.

lutions, diplomatic correspondence, judicial decisions, legal opinions, agreements, etc. – showing in detail the positions taken both in intergovernmental organizations and by States, and the solutions, if any, which have been arrived at, so that the Special Rapporteur may be afforded a clear view of international practice on points which have given difficulty during the period.

11. The Special Rapporteur has already been in touch with the legal advisers of a number of the specialized agencies as well as those of a number of regional organizations. The Codification Division of the United Nations Office of Legal Affairs furnished the Special Rapporteur with a collection of data including a complete set of the *United Nations Juridical Yearbook* (1962–1975). It contains legislative texts and treaty provisions concerning the legal status of the United Nations and related intergovernmental organizations, thus offering an important source sup-

plementing the 1960 and 1961 relevant volumes of the United Nations Legislative Series.<sup>8</sup> In addition, the *Juridical Yearbook* reproduces selected legal opinions which sometimes deal with questions which have arisen in practice relating to privileges and immunities. The Codification Division also furnished the Special Rapporteur with extracts from the records of the Sixth Committee at the thirty-second session of the General Assembly, setting out the comments of delegations on the part of the report of the Commission relating to the second part of the topic of relations between States and international organizations.

<sup>8</sup> *Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations*, vols. I and II (United Nations publications, Sales Nos. 60.V.2 and 61.V.3, respectively).

## CHAPTER II

### Summary of the Commission's discussion at its twenty-ninth session

12. The Commission, as noted above,<sup>9</sup> discussed the preliminary report of the Special Rapporteur at its 1452nd to 1454th meetings, held on 4, 5 and 6 July 1977.

#### A. The question of the advisability of codifying the second part of the topic

13. Mr. Sette Câmara<sup>10</sup> noted that there had not yet been any attempt to codify the international law relating to the legal status and immunities of international organizations. He stated that he had no doubt that the topic was ripe for codification. If it were codified, it would become the last in a series of codification instruments relating to diplomatic law, which included the 1961 Vienna Convention on Diplomatic Relations,<sup>11</sup> the 1963 Vienna Convention on Consular Relations,<sup>12</sup> the 1969 Convention on Special Missions<sup>13</sup> and the 1975 Vienna Convention.<sup>14</sup>

14. Mr. Tabibi<sup>15</sup> pointed out that the codification and harmonization of the rules relating to the status, privileges and immunities of international organizations were of vital importance, especially as international organizations now had offices throughout the world which would greatly benefit from a set of rules applicable on a world-wide scale.

15. Mr. Šahović<sup>16</sup> agreed in principle with the Special Rapporteur's views. He stated, however, that

he was not unaware of the reasons for which the Commission had previously decided to defer consideration of the second part of the topic. He referred to the Special Rapporteur's opinion to the effect that most of those reasons no longer existed and commented that he himself believed that there must still be factors which militated against such an undertaking or were, at least, calculated to make the task of the Special Rapporteur and of the Commission very difficult.

16. Mr. Calle y Calle<sup>17</sup> stated that it might be claimed that it was premature to undertake codification of the rules relating to the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities who were not representatives of States. It could be asserted that the question was already regulated by treaties, and more particularly by headquarters agreements. But he believed that the sooner the subject was properly regulated, the greater the benefits would be to both States and international organizations. Hence, from a variety of different conventions, it was necessary to select general rules to fill any existing gaps.

17. Mr. Dadzie<sup>18</sup> stated that the preliminary report of the Special Rapporteur clearly established that there was a sufficiently large corpus of rules for the Commission to undertake the work of codification.

18. Mr. Verosta<sup>19</sup> counselled caution in the Commission's approach to the codification of the second part of the topic. He pointed out that at the present

<sup>9</sup> See para. 4 above.

<sup>10</sup> *Yearbook ... 1977*, vol. I, p. 204, 1452nd meeting, paras. 24–25.

<sup>11</sup> United Nations, *Treaty Series*, vol. 500, p. 95.

<sup>12</sup> *Ibid.*, vol. 596, p. 261.

<sup>13</sup> General Assembly resolution 2530 (XXIV), annex.

<sup>14</sup> For reference, see foot-note 1 above.

<sup>15</sup> *Yearbook ... 1977*, vol. I, p. 205, 1452nd meeting, para. 27.

<sup>16</sup> *Ibid.*, paras. 31 and 34.

<sup>17</sup> *Ibid.*, p. 206, para. 40.

<sup>18</sup> *Ibid.*, p. 207, para. 45.

<sup>19</sup> *Ibid.*, para. 48.

stage, the Commission could not be sure of the outcome of the work; it might take the form of a convention, an additional protocol to the 1975 Vienna Convention, or perhaps something of even lesser standing.

19. Mr. Sucharitkul<sup>20</sup> stated that he fully endorsed the tentative conclusions reached by the Special Rapporteur in his preliminary report.

20. Mr. Reuter<sup>21</sup> drew the Commission's attention to the fact that the topic, like that of State succession, covered a vast area and the Special Rapporteur should be given wide discretion, so that he could start with the most tractable problems.

21. Mr. Francis<sup>22</sup> stated that it was difficult to see how the Commission could avoid, or be made to avoid, proceeding further with the topic, which brought into focus the need to complement other branches of diplomatic law already codified by the Commission.

22. Mr. Schwebel<sup>23</sup> cautioned that a reasonable balance should be struck between the privileges and immunities of international organizations and the jurisdiction of host States.

23. Mr. Quentin-Baxter,<sup>24</sup> while not opposing further work on the topic of relations between States and international organizations, sounded a note of prudence to the effect that the second part of the topic was pre-eminently one which called for such a low-key approach. In his opinion, the best course would be to proceed gradually and the Commission might well find sufficient reward at the end of its enquiries if it pursued them gently.

24. Mr. Tsuruoka<sup>25</sup> pointed out that he assumed that the Commission intended to draw up an international legal instrument designed to promote the activities of international organizations, which were rendering increasingly valuable services to the peace and prosperity of States and to the well-being of peoples in many fields. He emphasized that it was necessary to work out general rules which were simple and well-balanced and to avoid the pitfalls of detail and inflexibility.

25. Mr. Ushakov<sup>26</sup> stated that he thought that the question of the status of international organizations was ripe for codification and that the Commission could find a general basis for the work in the existing conventional and customary rules. He pointed out that there were nearly 300 international organizations, which included organizations of a universal character and regional organizations. Those organizations had their headquarters in the territory of a member State or a non-member State, and some of

them had permanent organs in the territory of other States. Consequently, the topic of relations between States and international organizations was extremely important for the whole of the international community, for over half the States in the world were now host States.

26. Sir Francis Vallat<sup>27</sup> shared the view that the Special Rapporteur should be asked to proceed with his study of the second part of the topic. He referred to certain risks involved in the endeavours of the Commission to codify such a subject as the legal status of international organizations. He pointed out that there was some fear of uniformity, because it was thought that, once uniformity had been achieved, international organizations might obtain maximum rather than minimum privileges and immunities. The possibility that the rules to be formulated by the Commission might constitute a kind of minimum standard as referred to by some members of the Commission would also, in the opinion of Sir Francis Vallat, involve a risk, because a minimum standard might encourage international organizations established in the future to ask for the minimum and then more. He was therefore of the opinion that the Commission would be right in not trying to codify every aspect of the status, privileges and immunities of international organizations.

#### B. The question of the scope of the topic

27. Sir Francis Vallat,<sup>28</sup> in his capacity as Chairman of the Commission, stated at the start of the debate on the preliminary report of the Special Rapporteur that he was not certain whether the Special Rapporteur intended consideration of the second part of the topic to be confined to international organizations of a universal character. Clarification of that point would be useful to the international organizations, specialized agencies and host States, which would be requested to provide information on their practice in regard to the status, privileges and immunities of international organizations and their officials.

28. Mr. Calle y Calle<sup>29</sup> said that he was inclined to think that the Commission's work should cover all international organizations, not simply the organizations in the United Nations family.

29. Mr. Dadzie<sup>30</sup> considered that the task of the progressive development of international law demanded that the rules to be formulated by the Commission should apply to all international organizations and not exclusively to those of a universal character.

30. Mr. Verosta,<sup>31</sup> stated that, before proceeding further, the Commission should perhaps press for a decision by the Special Rapporteur on whether the draft articles would be confined to international or-

<sup>20</sup> *Ibid.*, para. 50.

<sup>21</sup> *Ibid.*, p. 210, 1453rd meeting, para. 13.

<sup>22</sup> *Ibid.*, para. 14.

<sup>23</sup> *Ibid.*, para. 18.

<sup>24</sup> *Ibid.*, p. 211, paras. 24 and 27.

<sup>25</sup> *Ibid.*, para. 29.

<sup>26</sup> *Ibid.*, p. 212, paras. 32 and 35.

<sup>27</sup> *Ibid.*, paras. 38-39.

<sup>28</sup> *Ibid.*, p. 205, para. 30.

<sup>29</sup> *Ibid.*, p. 206, para. 41.

<sup>30</sup> *Ibid.*, p. 207, para. 46.

<sup>31</sup> *Ibid.*, para. 48.



ganizations of a universal character or would also include regional organizations.

31. Mr. Sucharitkul<sup>32</sup> said that he was inclined to believe that the Commission should consider the privileges and immunities of all international organizations.

32. Mr. Reuter<sup>33</sup> warned the Commission not to be unduly influenced, in defining the scope of the second part of the topic, with its decision to broaden the scope of the draft articles on treaties concluded between States and international organizations or between two or more international organizations of which he is the Special Rapporteur and making them applicable to all international organizations, whether of a universal character or regional. The drafting of articles relating to treaties to which international organizations were parties must necessarily remain within the sphere of general international law. For such treaties did exist, and they were subject to rules which could not be the rules of any international organization; an international organization, by definition, would not agree to conclude a treaty with another international organization if it had to submit to the rules of that other organization. The 1975 Vienna Convention had an entirely different object. In that sphere, special rules of international law existed for each organization, so that it had not been a matter of drafting rules which had originally been rules of general international law, but of unifying rules of special international law. For the second time, the Commission was preparing to undertake such work for the unification of public international law, the results of which would correspond to the unification of private international law. Mr. Reuter concluded that, in these circumstances, he would be inclined to say that the wider the circle of international organizations covered, the more numerous would be the special laws unified and, consequently, the more complete the Commissions' work. From the point of view of the unification of law alone, such should indeed be the Commission's object but, on the other hand, it must show moderation and reason. It could not expect at the outset to unify the law of every individual international organization in existence. It was, of course, desirable that it should succeed in doing so, but that seemed unlikely. It might be that conclusions similar to those which the Commission had been obliged to accept in its earlier work, and at the United Nations Conference on the Representation of States in their Relations with International Organizations (Vienna, 1975), would again be unavoidable.

33. Mr. Quentin-Baxter<sup>34</sup> stated that it was too early to establish the definitive scope of further work on the subject, and he fully shared the view that the Commission should begin by considering organizations in the United Nations system. Nevertheless, he believed that the value of the draft would greatly

depend on whether other smaller, regional organizations could relate it to their own circumstances; in other words, on whether it was a draft which would help them to understand the essential laws of their own existence and of their relationship to States.

34. Mr. Tsuruoka<sup>35</sup> said he was in favour of limiting the scope of the study, if only because the Commission would not have time to draw up rules applicable to all international organizations. The rules governing international organizations were very numerous and diverse. To overcome the disadvantages of limiting the subject, the Commission could draft an article similar to article 3 of the Vienna Convention on the Law of Treaties,<sup>36</sup> reserving wider application of the instrument.

35. Mr. Ushakov<sup>37</sup> stated that it was too soon to decide whether the study should be confined to international organizations of a universal character. Before taking that decision, the Commission should consult the United Nations, the specialized agencies and States in order to ascertain their views and obtain information.

36. Sir Francis Vallat<sup>38</sup> noted that the question had been raised whether the study should be confined to relations between States and international organizations of a universal character. That question had not been answered during the discussion and his own view was that it was not a question which the Commission should answer at present; it would require further investigation and the advice and guidance of the Special Rapporteur.

### C. The subject-matter of the envisaged study

37. In his preliminary report, the Special Rapporteur referred to three categories of privileges and immunities which might constitute the subject-matter of the study: (a) the organization; (b) officials of the organization; (c) experts on missions for and persons having official business with the organizations and not being representatives of States.<sup>39</sup> He also referred to resident representatives and observers which may represent or be sent by one international organization to another international organization.<sup>40</sup>

38. Several members of the Commission endorsed the tentative suggestion of the Special Rapporteur regarding the definition of the subject-matter of the study. Some members of the Commission elaborated on the suggestion of the Special Rapporteur and presented a number of refinements and amplifications.

<sup>35</sup> *Ibid.*, para. 31.

<sup>36</sup> *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289. (Hereafter referred to as "the Vienna Convention".)

<sup>37</sup> *Yearbook ... 1977*, vol. I, p. 212, 1453rd meeting, para. 35.

<sup>38</sup> *Ibid.*, para. 38.

<sup>39</sup> *Yearbook ... 1977*, vol. II (Part One), p. 153, document A/CN.4/304, paras. 70-73.

<sup>40</sup> *Ibid.*, p. 155, para. 78.

<sup>32</sup> *Ibid.*, para. 52.

<sup>33</sup> *Ibid.*, p. 209, paras. 9-10.

<sup>34</sup> *Ibid.*, p. 211, para. 25.

39. Mr. Calle y Calle<sup>41</sup> said the Commission should take a broad view and should not let itself be bogged down by the problem of defining an international organization. It was now proceeding on the basis of the simplest possible definition, namely, that an international organization was an intergovernmental organization. Nor should the Commission go further into the problem of the legal capacity of international organizations, although both those matters were now becoming clearer as a result of decisions by the International Court of Justice and the very existence of international organizations.

40. Mr. Dadzie<sup>42</sup> stated he had been particularly interested to note the Special Rapporteur's comments on experts performing missions for international organizations. As someone who had been the representative of a State and, in recent years, the representative of an international organization to such important bodies as OAU, he fully endorsed the Special Rapporteur's comment that it was essential to study the question of the representation of one international organization in its relations with another.

41. Mr. Reuter<sup>43</sup> noted that the question of the privileges and immunities of an international organization was linked with that of the privileges and immunities of an international official, but the latter raised delicate problems, including tax problems, which States were loath to discuss. Indeed, some States refused their own nationals who were officials of international organizations the privileges and immunities they granted international officials of other nationalities. That situation had led to many compromises in the United Nations. He therefore considered that a few problems should be selected for consideration at the first stage, such as those concerning international organizations, and that the much more delicate problems relating to international officials should be left till later.

42. Mr. Tsuruoka<sup>44</sup> stated that it was necessary to decide not only which international organizations should be covered, but also to which officials of international organizations the future draft articles should be addressed. He added that one question to which the Special Rapporteur had referred, and which should be clarified some time, was the precise status of the members of the Commission.

43. Mr. Ushakov<sup>45</sup> pointed out that, besides relations between States and international organizations, it was also necessary to study the problem of relations between international organizations, for many of them had representatives attached to other international organizations. For instance, CMEA had a permanent observer at the United Nations General Assembly in New York. The question which arose in

both cases, and which had not yet been settled, was that of the legal status and privileges and immunities of the representatives of international organizations.

44. Sir Francis Vallat<sup>46</sup> stated that, with regard to the subject-matter of the study, he noted that most members of the Commission assumed that it would deal with the effect of the existence and operation of international organizations in the territory of States; in other words, with the effect or lack of effect of internal law on international organizations, not with the international relations of organizations and States or the international relations of organizations *inter se*. He drew attention to that assumption in order to stress the fact that, at present, it would be unwise for the Commission to place undue restrictions on the subject-matter of the study. Moreover, if that assumption was correct, it would mean that the study should deal with three basic questions, namely, the capacity or status of international organizations in internal law, the privileges of international organizations, and the immunities of international organizations.

45. He had specially mentioned such capacity, because he thought that one of the basic questions to be answered in the study was whether an international organization had legal capacity to contract within the system of internal law and to act as a body corporate by virtue only of its establishment and existence. He was particularly aware of the importance of that question because in the United Kingdom it had had to be decided whether a commodity council, to which the relevant agreement had accorded only the capacity of a body corporate, but no privileges and immunities, was governed by United Kingdom legislation, which dealt essentially with capacity in the context of privileges and immunities. Although that problem had been solved by the adoption of the necessary Order in Council, it had clearly shown that the question of the capacity or status of an international organization was separate from the question of its privileges and immunities.

46. In that connexion, he thought the study should deal with the scope and content of Articles 104 and 105 of the Charter of the United Nations, which also made a distinction between the legal capacity necessary for the exercise of the Organization's functions and the privileges and immunities necessary for the fulfilment of its purposes. It should also be borne in mind, however, that if the study dealt with the status, privileges and immunities of an international organization itself, as distinct from those of its officials and experts, it would be moving away from diplomatic law and towards the subject of State immunity, which the Commission had not yet examined, but which it might take up as a topic parallel to that being studied by the Special Rapporteur. Although there was, in a sense, a parallel between State immunity and the immunity of an international organization, there was also a very fundamental difference between those concepts, for

<sup>41</sup> *Yearbook ... 1977*, vol. I, p. 206, 1452nd meeting, para. 42.

<sup>42</sup> *Ibid.*, p. 207, para. 44.

<sup>43</sup> *Ibid.*, p. 210, 1453rd meeting, para. 13.

<sup>44</sup> *Ibid.*, p. 211, para. 31.

<sup>45</sup> *Ibid.*, p. 212, para. 33.

<sup>46</sup> *Ibid.*, p. 213, paras. 41-43.

State immunity was based on the idea of a State's sovereignty and absolute immunity from foreign jurisdiction, whereas the immunity of an international organization derived from its constituent instruments and any relevant agreements that conferred on it the privileges and immunities necessary for the exercise of its functions. The parallel between those two concepts could be seen, however, in cases where, for example, local courts dealt with questions of immunity and of waiver in very much the same manner for international organizations as for States.

#### D. The theoretical basis of immunities of international organizations

47. Mr. Sette Câmara<sup>47</sup> said that, in undertaking the task of codification of the international law relating to the legal status and immunities of international organizations, the Commission should not adopt the view that it was through the generosity of host Governments that officials of international organizations were entitled to certain privileges and immunities; it should take the view that officials of international organizations needed such privileges and immunities in order to carry out the tasks entrusted to them. Those privileges and immunities had, until now, been governed piecemeal by agreements whose provisions varied considerably. It would be the Commission's task to organize those provisions in an additional protocol, a code or a declaration, so that, although they might constitute residual rules, they would nevertheless be generally applicable to as many international organizations as possible. In attempting to formulate such rules, the Commission should pay particular attention to the provisions of Articles 104 and 105 of the Charter of the United Nations and the corresponding articles of the constituent instruments of the specialized agencies.

48. Mr. Tabibi<sup>48</sup> stated that he believed that the rules to be formulated by the Commission, no matter what form they took, should protect both the interests of host Governments, for which security was of crucial importance, and the interests of international organizations, which should be able to continue their work of promoting international peace and co-operation.

49. Mr. Šahović<sup>49</sup> pointed out that, in his preliminary report, the Special Rapporteur had indicated the general evolution of law on the subject, but he should now proceed to a much more concrete analysis of the situation, taking account of new developments. His first task would be to make sure of the value of the existing conventional rules on which he intended to base his work. To that end, it was important to make a comprehensive study of practice. He emphasized the need to base future reports on a systematic analysis of existing practice and legal rules.

<sup>47</sup> *Ibid.*, p. 204, 1452nd meeting, para. 24.

<sup>48</sup> *Ibid.*, p. 205, para. 28.

<sup>49</sup> *Ibid.*, pp. 205–206, paras. 32 and 34.

50. Mr. Calle y Calle<sup>50</sup> pointed out that, in formulating the rules governing relations between States and international organizations, it should be borne in mind that they were relations between States and the bodies they set up to carry out functions which they could not perform themselves. While it was true that, for certain matters, earlier historical precedents could be found, the true point of departure was the Charter signed at San Francisco in 1945. It had been followed in 1946 by the Convention on the Privileges and Immunities of the United Nations<sup>51</sup> and, in 1947, by the Convention on the Privileges and Immunities of the Specialized Agencies.<sup>52</sup> The 1946 Convention was now in force for 112 States. It could therefore be regarded as truly universal.

51. Mr. Sucharitkul<sup>53</sup> stated that the legal basis for the status of international organizations and the privileges and immunities accorded to such organizations or their officials was to be found in the various types of conventions of a general character – for instance, the 1946 Convention and the 1947 Convention – and also the various bilateral agreements, special agreements and headquarters agreements. In addition, a perusal of the *United Nations Juridical Yearbook*, for example, clearly showed some of the national legislation which gave effect to the various conventions and agreements. The privileges and immunities of an international organization, of whatever type, were necessarily qualified or limited by the functions of the organization and its officials. They were limited because the organization and its officials were not immune from substantive law, but only from jurisdiction.

52. Mr. Reuter<sup>54</sup> pointed out that the granting of the privileges of an international official depended upon the functions of the international organization. A customary rule could be considered to exist according to which the privileges and immunities of an international official were based on, and limited by, the requirements of his functions. In his opinion, that was a very general rule, however, and it was necessary to ascertain, for example, whether the organization was obliged to suspend those privileges and immunities when the functions were not being exercised.

53. Mr. Francis<sup>55</sup> said that the growth of the legal status of international organizations and the privileges and immunities granted to them and to their officials resulted from the enlightened interplay of the foreseeable requirements of international organizations and the fundamental requirements of the internal law of States. Over the years, a wide range of customary rules had emerged and no one could deny

<sup>50</sup> *Ibid.*, p. 206, para. 39.

<sup>51</sup> United Nations, *Treaty Series*, vol. 1, p. 15. Hereafter referred to as the "1946 Convention".

<sup>52</sup> *Ibid.*, vol. 33, p. 261. Hereafter referred to as the "1947 Convention".

<sup>53</sup> *Yearbook ... 1977*, vol. I, p. 207, 1452nd meeting, paras. 51–52.

<sup>54</sup> *Ibid.*, p. 209, 1453rd meeting, para. 12.

<sup>55</sup> *Ibid.*, p. 210, paras. 14–15.

that, at the present time, a large body of such rules was applicable to international organizations and to their accredited officials.

54. Mr. Schwebel<sup>56</sup> stated that international organizations must have functional privileges and immunities. He cautioned, however, that a reasonable balance should be struck between the privileges and immunities of international organizations and the jurisdiction of host States. It was particularly important to bear in mind the limited character of privileges and immunities, because of the popular reaction to what was often considered an undue extension of them. In his opinion, the real problem related to diplomatic privileges and immunities, not to those accorded to the secretariats of international organizations.

55. Mr. Quentin-Baxter<sup>57</sup> said that at the doctrinal level, the nature of custom in its application to international organizations was clearly a matter of great difficulty and complexity. At the level of common sense, however, it was plain that States had developed some customary rules or common conceptions in their approach to international organizations and officials.

56. Mr. Tsuruoka<sup>58</sup> pointed out that, in the sphere of privileges and immunities of international organizations, the rules were evolving so much that it was difficult to foresee where the trend would lead. It was necessary to consider the interests both of those who benefited from privileges and immunities and those who granted them.

57. Mr. Ushakov<sup>59</sup> stated that the existing rules of diplomatic law of international organizations were based on the common principle that an international organization, in order to exist, must enjoy a special status in the State, whether a member or a non-member, in whose territory it had headquarters. For without a headquarters agreement establishing that status, an international organization could neither exist nor operate as such. The privileges and immunities of the officials of an international organization were also indispensable for its existence and operation. That was a general rule on which all relations between States and international organizations were based.

58. Sir Francis Vallat<sup>60</sup> commented on paragraph 59 of the report of the Special Rapporteur, where reference had been made to the views expressed in Parliament by the Minister of State during the introduction of the 1944 British Diplomatic Privileges (Extension) Act.<sup>61</sup> He pointed out that those views

had been expressed at a very early stage in the development of thinking on the status, privileges and immunities of international organizations, and since that time there had been many developments in statute law. At present, there was little doubt that the predominant view in United Kingdom government circles was that the functional approach was the right one and that the source of the privileges and immunities of international organizations lay in the relevant agreements. The wealth of treaties and legislation which had appeared since 1944 had had a definite impact on the basic theory of the status, privileges and immunities of international organizations, and it was now generally agreed that organizations enjoyed privileges and immunities in order to exercise the functions entrusted to them.

### E. The form to be given to the eventual codification

59. Mr. Sette Câmara<sup>62</sup> thought that it would be the Commission's task to organize the provisions of agreements relating to the privileges and immunities of international organizations and their officials, which had until now been governed piecemeal, in an additional protocol, a code or a declaration, so that, although they might constitute residual rules, they would nevertheless be generally applicable to as many international organizations as possible.

60. Mr. Tabibi<sup>63</sup> believed that the rules to be formulated by the Commission, no matter what form they took, would contribute to the codification and harmonization of the rules relating to the status, privileges and immunities of international organizations, which was of vital importance, especially as international organizations now had offices throughout the world which would greatly benefit from a set of rules applicable on a world-wide scale.

61. Mr. Calle y Calle<sup>64</sup> stated that the work of the Commission, if it was to take the form of an additional protocol, would complement the provisions of the 1975 Vienna Convention.

62. Mr. Verosta<sup>65</sup> pointed out that at the present stage, the Commission could not be sure of the outcome of the work; it might take the form of a convention, an additional protocol to the 1975 Vienna Convention, or perhaps something of even lesser standing.

duced in Parliament, the Minister of State explained that, where a number of Governments joined together to create an international organization to fulfil some public purpose, the organization should have the same status, immunities and privileges as the foreign Governments members thereof enjoyed under ordinary law. He elaborated that, in principle, they were entitled to it as a matter of international law which the courts would regard as being part of common law. However, legislation was regarded as desirable in order to put the legal position beyond dispute and to define with precision the extent of the prerogatives." (*Yearbook ... 1977*, vol. II (Part One), p. 151, document A/CN.4/304, para. 59.)

<sup>62</sup> *Yearbook ... 1977*, vol. I, p. 204, 1452nd meeting, para. 24.

<sup>63</sup> *Ibid.*, p. 205, paras. 27-28.

<sup>64</sup> *Ibid.*, p. 206, para. 42.

<sup>65</sup> *Ibid.*, p. 207, para. 48.

<sup>56</sup> *Ibid.*, paras. 19-20.

<sup>57</sup> *Ibid.*, p. 211, para. 23.

<sup>58</sup> *Ibid.*, para. 29.

<sup>59</sup> *Ibid.*, p. 212, para. 33.

<sup>60</sup> *Ibid.*, para. 36.

<sup>61</sup> "When ... at the end of 1944, the British Diplomatic Privileges (Extension) Act, which provided for immunities, privileges and capacities of the international organizations, their staff, and the representatives of member Governments, was intro-

63. Mr. Tsuruoka<sup>66</sup> said that he assumed that the Commission intended to draw up an international legal instrument designed to promote the activities of international organizations, which were rendering increasingly valuable services to the peace and prosperity of States and to the well-being of peoples in many fields.

#### F. Methodology and processing of data

64. Mr. Sette Câmara<sup>67</sup> pointed out that, although diplomatic activities were as old as society itself, the question of the status, privileges and immunities of international organizations, which came under the heading of multilateral diplomacy, was relatively new, in the sense that it had become a matter of concern only in the past 50 or 60 years. Moreover, there had not yet been any attempt to codify the international law relating to the legal status and immunities of international organizations. In attempting to formulate such rules, the Commission should pay particular attention to the provisions of Articles 104 and 105 of the Charter of the United Nations and the corresponding articles of the constituent instruments of the specialized agencies.

65. Mr. Tabibi<sup>68</sup> emphasized that the Commission had decided to deal with the practical aspects of the second part of the topic of relations between States and international organizations. In its task of codifying that second part, the Commission would be able to benefit greatly from the experience it had gained in studying the first part of that topic and the question of treaties between States and international organizations or between two or more international organizations. It would also be able to base its work on the experience gained over the years by the many Governments which were now hosts to international organizations. He stated that it might be advisable to request host Governments, such as those of the United States of America, France, Italy, Switzerland and Austria, to provide information on the main questions of concern to them in connexion with the topic under consideration. The Programme and Co-ordination Committee of the Economic and Social Council might be requested to suggest that host Governments should provide the Special Rapporteur with information.

66. Mr. Šahović<sup>69</sup> suggested that an endeavour should be made to propose solutions to the problems raised by the codification of legal rules relating to the status and to the privileges and immunities of international organizations. He pointed out that, in his preliminary report, the Special Rapporteur had indicated the general evolution of law on the subject, but he should now proceed to a much more concrete analysis of the situation, taking account of new developments. His first task would be to make sure of the value of the existing conventional rules on which

he intended to base his work. To that end, it was important to make a comprehensive study of practice.

67. Mr. Calle y Calle<sup>70</sup> stated that the Commission should take a broad view and should not let itself be bogged down by the problem of defining an international organization. It was now proceeding on the basis of the simplest possible definition, namely, that an international organization was an intergovernmental organization. Nor should the Commission go further into the problem of the legal capacity of international organizations, although both those matters were now becoming clearer as a result of decisions by the International Court of Justice and the very existence of international organizations. The main task was, he said, to guide the development of the law pertaining to international organizations and to ensure that its development was orderly and harmonious. It was essential to prevent the emergence of strange or hybrid bodies claiming a special status. In short, he believed, the Commission should endeavour to channel, plan and organize what was a dynamic branch of present-day law.

68. Mr. Verosta<sup>71</sup> suggested that a number of other regional organizations could be included in the list in paragraph 31 of the Special Rapporteur's preliminary report<sup>72</sup> – for example, the Organization of the Danube Commission, or OPEC. The treaty between the OPEC States was short, but the headquarters agreement between OPEC and Austria was quite elaborate. He said he was gratified to learn that the Special Rapporteur would attempt to obtain information from the regional organizations, for without such material it would not be possible to enlarge the scope of the articles later, if that course was found advisable. In any event, it would be a mistake, he felt, to undertake complete codification at the present time, for any rules laid down now or in the near future might well be counter-productive, especially in the case of regional organizations.

69. Mr. Sucharitkul<sup>73</sup> pointed out that a perusal of the *United Nations Juridical Yearbook*, for example, clearly showed some of the national legislation which gave effect to the various conventions and agreements relating to the immunities of international organizations. The status of an international organization was meaningful only if it was recognized at two levels: the international and the national. In other words, an international organization had to be given full legal capacity under public international law and it had to be recognized under the internal law of its member countries, especially that of the country in which it had its headquarters. An inter-

<sup>70</sup> *Ibid.*, pp. 206–207, paras. 42–43.

<sup>71</sup> *Ibid.*, p. 207, paras. 48–49.

<sup>72</sup> The Special Rapporteur referred, in paragraph 31 of his preliminary report (*Yearbook ... 1977*, vol. II (Part One), p. 145, document A/CN.4/304) to the following regional organizations: the League of Arab States, OAS, the Council of Europe, ECSC, EEC, CMEA, EFTA, and OAU.

<sup>73</sup> *Yearbook ... 1977*, vol. I, p. 207, 1452nd meeting, para. 51, and p. 208, 1453rd meeting, paras. 4–5.

<sup>66</sup> *Ibid.*, p. 211, 1453rd meeting, para. 29.

<sup>67</sup> *Ibid.*, p. 204, 1452nd meeting, para. 24.

<sup>68</sup> *Ibid.*, p. 205, paras. 27–29.

<sup>69</sup> *Ibid.*, para. 32.

national organization usually entered into contracts and possessed movable and immovable property; hence, recognition of its status under internal law was absolutely vital. He said that the Government of Japan had granted certain privileges and immunities to the United Nations University, but that the University was what might be termed a lesser organ and its head could not be compared with the Secretary-General of the United Nations; the scope of his immunities was restricted by the nature of his functions. Obviously, the practice of States was of great significance. National courts sometimes applied the principles relating to immunities as principles of international law, though the courts in the United Kingdom regarded those principles as being already incorporated into internal law. The difficult practice in the United States of America, resulting from the recent legislation concerning suits against foreign Governments, would probably have some effect on suits against international organizations. He observed that the group of States which form ASEAN had come to adopt what the Special Rapporteur had aptly termed customary practice. ASEAN meetings at various levels had been granted the traditional or customary privileges and immunities accorded to "organizations of a similar character", though exactly what was meant by that expression was doubtless open to different interpretations. His own country, Thailand, afforded an example of particularly rich experience in State practice – for instance, the arrangements made for ESCAP, the South East Asian Ministers of Education Secretariat and SEATO, an organization which had recently been dissolved but nonetheless, for the purpose of legal studies, gave a complete picture of the formation of headquarters agreements and bilateral arrangements.

70. Mr. Reuter<sup>74</sup> pointed out that it was not so much between the universal or regional character of international organizations that it was necessary to distinguish, as between the major administrative political organizations, such as the United Nations and its specialized agencies, and the ever-increasing number of organizations of a more or less operational character which performed banking or commercial functions. As Special Rapporteur responsible for the study of treaties to which international organizations were parties, he had examined the compilation in five volumes entitled "Economic co-operation and integration among developing countries: compilation of the principal legal instruments".<sup>75</sup> He had noted that the question of the privileges and immunities of the bodies concerned was discussed there, and that certain analogies could be drawn with the major specialized agencies, though at first sight the position of an organization such as WHO was not at all similar to that of a body such as the African Development Bank. That was why it was important not to set limits to the Special Rapporteur's work. It might, however, be considered advisable, at least to start with, to confine that work to organizations in

the United Nations family, since the Commission itself was one of them. Admittedly, the United Nations had set up regional organizations which carried out certain operational activities, but it was for the Special Rapporteur to delimit the scope of his subject.

71. Mr. Reuter<sup>76</sup> also stated that a customary rule could be considered to exist according to which the privileges and immunities of an international official were based on, and limited by, the requirements of his functions. That was a very general rule, however, and it was necessary to ascertain, for example, whether the organization was obliged to suspend those privileges and immunities when the functions were not being exercised. If so, by what criterion would it be recognized that the functions were no longer involved? There was a wealth of jurisprudence on the liability of the international officials involved in traffic accidents and the Commission's work would only be useful if it managed to work out rather more specific formulas than those generally used.

72. Mr. Francis<sup>77</sup> pointed out that, some years ago, when he had been the legal adviser of the Ministry of Foreign Affairs in his country, a representative of OAS had arrived in Jamaica to establish a regional office. At that time there had been no question but that, even in the absence of an agreement, the representative of the organization was entitled to certain basic privileges. Customary law unquestionably played an important role in the present topic and had, he said, been dealt with most constructively by the Special Rapporteur.

73. Mr. Francis<sup>78</sup> referred to a passage in the preliminary report of the Special Rapporteur<sup>79</sup> indicating the lack of uniformity in the treatment of experts on missions for international organizations and stated this lack of uniformity applied also to the treatment of persons having official business with international organizations, who were generally granted the right of transit. In that connexion, the important question was whether, in view of the functional needs of international organizations, the right of transit was sufficient. In his opinion, persons in such a position should be afforded a measure of protection that went beyond the right of transit. He also emphasized that the role of experts was now very different from that envisaged when the 1946 and 1947 Conventions on the Privileges and Immunities of the United Nations and on the Specialized Agencies were respectively concluded. Furthermore, he stated that it would be useful to obtain more complete and up-to-date information from the specialized agencies. Almost certainly, he said, it would be possible in the end to arrive at conclusions acceptable to all Commission members, which would go to

<sup>74</sup> *Yearbook ... 1977*, vol. I, p. 209, 1453rd meeting, para. 12.

<sup>75</sup> *Ibid.*, p. 210, para. 15.

<sup>76</sup> *Ibid.*, paras. 16–18.

<sup>77</sup> *Yearbook ... 1977*, vol. II (Part One), p. 153, document A/CN.4/304, para. 72.

<sup>74</sup> *Ibid.*, p. 209, para. 11.

<sup>75</sup> TD/B/609/Add.1, vols. I, II, III (and Corr.1), IV, V.

make up a body of rules that were not confined entirely to international organizations of a universal character.

74. Mr. Schwebel<sup>80</sup> said that it was particularly important to bear in mind the limited character of privileges and immunities of international organizations, because of the popular reaction to what was often considered an undue extension of them. A reasonable balance should be struck between those privileges and immunities and the jurisdiction of host States, not only for reasons of equity, but also in order to improve the popular image of international organizations – a matter which could not be lightly discounted.

75. Mr. Quentin-Baxter<sup>81</sup> stated that, at the doctrinal level, the nature of custom in its application to international organizations was clearly a matter of great difficulty and complexity. At the level of common sense, however, it was plain that States had developed some customary rules or common conceptions in their approach to international organizations and officials. It would be wise for the Commission, he said, to move tentatively, allowing time for State practice to develop, and to preserve a sense of priorities which would rank sovereign immunities above the equally difficult problems concerning the immunities of officials of international organizations. The Special Rapporteur had emphasized that the Commission preferred to follow an empirical method and to deal with problems that were of immediate practical interest to States and for which there was at least a reasonable possibility of an agreed solution. The subject had been, he stressed, rightly described as one which fell within the field of diplomatic law and did not raise the enormous theoretical problems that surrounded the question of the personality, capacity and role of international organizations.

76. Mr. Tsuruoka<sup>82</sup> stated that the rules drawn up by the Commission were not entirely residuary. As the late Mr. Bartos, former Special Rapporteur for the topic of special missions, had pointed out when submitting his draft articles, there was a minimum number of imperative rules even when the subjects of international law concerned were left wide latitude. And where the status and the privileges and immunities of international organizations were concerned, the Commission was not going to leave the field entirely open to the independent will of those concerned. That was an additional reason for formulating simple rules and seeking compromise solutions. Such solutions were also dictated by the fact that in that sphere the rules were evolving so much that it was difficult to foresee where the trend would lead. Moreover, it was necessary to consider the interests both of those who benefited from privileges and immunities and of those who granted them. In

that connexion, he pointed out that the question of the privileges and immunities to be granted to the United Nations University at Tokyo and to the members of its staff had been the subject of heated discussion in the Japanese Government. It was necessary to find solutions that offered a compromise between theory and pragmatism, and in some cases the Commission should not hesitate to engage in progressive development of international law.

77. Mr. Ushakov<sup>83</sup> pointed out that the topic of relations between States and international organizations was extremely important for the whole of the international community, for over half the States in the world were now host States. The headquarters of CMEA was in Moscow and almost all the socialist countries had the headquarters of an international organization in their territory. There was already a wealth of practice and well-established customary and conventional rules on the subject, deriving from the headquarters agreements concluded between States and international organizations. But relations between States and international organizations differed widely from one headquarters agreement to another, and the rules governing them should be unified.

78. He also stated<sup>84</sup> that the existing rules of diplomatic law were not imperative rules, but always subsidiary or residuary rules. There was thus no risk of their being too rigid or too flexible, because international organizations and States could derogate from them. He did not think that they were always special rules, since they were based on the common principle that an international organization, in order to exist, must enjoy a special status in the State, whether a member or a non-member, in whose territory it had its headquarters. For without a headquarters agreement establishing that status, an international organization could neither exist nor operate as such. The privileges and immunities of the officials of an international organization were also indispensable for its existence and operation. That was a general rule on which all relations between States and international organizations were based.

79. Sir Francis Vallat<sup>85</sup> stated that the Special Rapporteur should be given the fullest freedom to examine any material he thought might be useful, whether it related to organizations of a universal character, members of the United Nations family, regional organizations or other types of organization. The Special Rapporteur should examine a good deal of national legislation in order to arrive at some conclusions concerning the relationship between international organizations and the exercise of State jurisdiction, for it was through a study of the interplay of international treaties and national legislation that the Commission would be able to decide which rules should be included in a codification instrument.

<sup>80</sup> *Yearbook* ... 1977, vol. I, p. 210, 1453rd meeting, paras. 19–21.

<sup>81</sup> *Ibid.*, p. 211, paras. 24–25.

<sup>82</sup> *Ibid.*, para. 30.

<sup>83</sup> *Ibid.*, pp. 211–212, paras. 32–33.

<sup>84</sup> *Ibid.*, p. 212, para. 34.

<sup>85</sup> *Ibid.*, para. 40.



80. He specially mentioned<sup>86</sup> the capacity or status of international organizations in internal law because he thought that one of the basic questions to be answered in the study was whether an international organization had legal capacity to contract within the system of internal law and to act as a body corporate by virtue only of its establishment and existence. He was particularly aware of the importance of that question because in the United Kingdom it had had to

<sup>86</sup> *Ibid.*, p. 213, para. 42.

be decided whether a commodity council, to which the relevant agreement had accorded only the capacity of a body corporate but no privileges and immunities, was governed by United Kingdom legislation, which dealt essentially with capacity in the context of privileges and immunities. Although that problem had been solved by the adoption of the necessary Order in Council, it had clearly shown that the question of the capacity or status of an international organization was separate from the question of its privileges and immunities.

### CHAPTER III

#### Summary of the Sixth Committee's discussion at the thirty-second session of the General Assembly

81. Statements made by representatives at the Sixth Committee, during its consideration at the thirty-second session of the General Assembly of the report of the Commission on the work of its twenty-ninth session,<sup>87</sup> were mainly devoted to the major items on the present agenda of the Commission on which it had prepared draft articles with commentaries. They are: State responsibility, succession of States in respect of matters other than treaties, and the question of treaties concluded between States and international organizations or between two or more international organizations. The work of the Commission at its twenty-ninth session on the second part of the topic "Relations between States and international organizations" was reflected in chapter V of its report, entitled "Other decisions and conclusions of the Commission", which indicated the groundwork and preliminary decisions made by the Commission on a number of items, work on which may be said to be still in the initial stages. They are: the law of the non-navigational uses of international watercourses, status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and the second part of the topic "Relations between States and international organizations". As chapter V had the character of a progress report, the subjects referred to therein, including the second part of the topic of relations between States and international organizations, did not evoke the detailed discussion in the Sixth Committee which is usually accorded to the major topics regarding which the Commission submits to the General Assembly draft articles with commentaries.

82. Apart from certain reservations expressed by a few delegations in the Sixth Committee regarding the desirability of giving a high degree of priority to work on the topic or the implications of such work for the position of the General Conventions on the privileges and immunities of the United Nations and the specialized agencies and headquarters agree-

ments, the decision of the Commission to resume its work on the second part of the topic was endorsed by the Sixth Committee.

83. Introducing the report of the Commission to the Sixth Committee, the Chairman of the Commission at its twenty-ninth session, (Sir Francis Vallat),<sup>88</sup> pointed out that at the moment the Commission had not attempted to answer the basic question whether the second part of the subject should, like the first, be limited to organizations of a universal character or should extend to other international organizations. That question, which required further study, was linked to the twofold danger, inherent in the subject, of overlapping or conflicting with the General Conventions on the privileges and immunities of the United Nations and the specialized agencies and of establishing standards which tended to maximize privileges and immunities rather than to confine them to what was functionally required for each international organization.

84. The representative of Brazil<sup>89</sup> stated that, in undertaking the task of studying the second part of the topic concerning relations between States and international organizations, the Commission should base its approach on the principle of functionalism. The privileges and immunities of officials of international organizations were not due to the generosity of host States but were indispensable if the officials were to carry out the tasks entrusted to them. So far such privileges and immunities had been established in a piecemeal fashion, and the Commission's task was to unify them and turn them into an instrument which, although it might consist of residual rules, could be applied to as many international organizations as possible. His delegation considered that the topic of the status, privileges and immunities of international organizations and their officials was

<sup>88</sup> *Official Records of the General Assembly, Thirty-second Session, Sixth Committee*, 25th meeting, para. 16; and *ibid.*, *Sixth Committee, Sessional Fascicle*, corrigendum.

<sup>89</sup> *Ibid.*, 30th meeting, para. 40; and *ibid.*, *Sixth Committee, Sessional Fascicle*, corrigendum.

<sup>87</sup> *Yearbook ... 1977*, vol. II (Part Two), p. 1, document A/32/10.

ripe for codification; its codification would complete the cycle of instruments on diplomatic law.

85. The representative of Romania<sup>90</sup> said the Commission had taken well-founded and relevant decisions on the law of the non-navigational uses of international watercourses, the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and the second part of the topic "Relations between States and international organizations."

86. The representative of Israel<sup>91</sup> questioned the usefulness of the work the Commission intended to do in the sphere of relations between States and international organizations, since those relations were already adequately regulated by conventions, practice and Article 105 of the Charter. The Sixth Committee should avoid encouraging another codification effort which might well prove abortive, like that which had culminated in the 1975 Vienna Convention.

87. The representative of Spain<sup>92</sup> stated that his delegation was not convinced that it would be useful to take up again the study of relations between States and international organizations so long as the 1975 Vienna Convention had not been generally accepted.

88. The representative of Thailand<sup>93</sup> stated that his delegation welcomed the Commission's decisions and conclusions, particularly those relating to the articles on the most-favoured-nation clause, to the continued study of the topic of the law of the non-navigational uses of international watercourses, to the further study of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and to further study of the second part of the topic "Relations between States and international organizations".

89. The representative of France<sup>94</sup> stated that his delegation favoured the continuation of work on the privileges and immunities of international organizations. However, it regretted the fact that the Commission had chosen to subdivide its work on relations between States and international organizations.

90. The representative of Burundi<sup>95</sup> said that, with regard to relations between States and international organizations, the Commission's discussions, as reflected in paragraphs 94 and 95 of its report,<sup>96</sup> seemed to indicate the best approach for work on that topic.

<sup>90</sup> *Ibid.*, 32nd meeting, para. 33; and *ibid.*, *Sixth Committee, Sessional Fascicle*, corrigendum.

<sup>91</sup> *Ibid.*, 36th meeting, para. 44; and *ibid.*, *Sixth Committee, Sessional Fascicle*, corrigendum.

<sup>92</sup> *Ibid.*, 39th meeting, para. 16; and *ibid.*, *Sixth Committee, Sessional Fascicle*, corrigendum.

<sup>93</sup> *Ibid.*, para. 27; and *ibid.*, *Sixth Committee, Sessional Fascicle*, corrigendum.

<sup>94</sup> *Ibid.*, 42nd meeting, para. 27; and *ibid.*, *Sixth Committee, Sessional Fascicle*, corrigendum.

<sup>95</sup> *Ibid.*, para. 57; and *ibid.*, *Sixth Committee, Sessional Fascicle*, corrigendum.

<sup>96</sup> *Yearbook ... 1977*, vol. II (Part Two), p. 127, document A/32/10.

91. The representative of New Zealand<sup>97</sup> stated that his delegation had read chapter V of the report of the Commission with great interest. Since the various questions which the Commission proposed to study were all of interest, it should include them in its programme of work as soon as possible and set to work forthwith on preparatory studies concerning them.

92. The representative of Egypt<sup>98</sup> said that his delegation noted with satisfaction the progress made by the Commission at its twenty-ninth session with regard to the second part of the topic of relations between States and international organizations.

93. The representative of India<sup>99</sup> stated that with regard to chapter V of the report of the Commission, he supported the decisions taken by the Commission with regard to its future programme of work.

94. The representative of the United States<sup>100</sup> said that he doubted the desirability of giving a high degree of priority to work on the second part of the question of relations between States and international organizations.

95. The representative of Venezuela<sup>101</sup> stated his delegation agreed with the decisions referred to in chapter V of the Commission's report.

96. The representative of Somalia<sup>102</sup> said that he was pleased to note that an important question, the second part of the topic of relations between States and international organizations, was currently being studied by the Commission.

97. The position taken by the Sixth Committee on the decisions of the Commission regarding the second part of the topic of relations between States and international organizations was summarized in its report to the General Assembly on agenda item 112 ("Report of the International Law Commission on the work of its twenty-ninth session") as follows:

197. Several representatives expressed satisfaction that the Commission had taken up the study of the second part of the topic concerning relations between States and international organizations on the basis of a preliminary report submitted by the Special Rapporteur, Mr. A. El-Erian. It was noted that the Commission's discussion of the report seemed to indicate that it could now consider that part of the topic, as it was ripe for codification, thereby completing its work of codifying diplomatic law. The view was expressed that in undertaking such a task, the Commission should base its approach on the principle of functionalism; the privileges and immunities of officials of international organi-

<sup>97</sup> *Official Records of the General Assembly, Thirty-second Session, Sixth Committee*, 42nd meeting, para. 79; and *ibid.*, *Sixth Committee, Sessional Fascicle*, corrigendum.

<sup>98</sup> *Ibid.*, 43rd meeting, para. 18; and *ibid.*, *Sixth Committee, Sessional Fascicle*, Corrigendum.

<sup>99</sup> *Ibid.*, para. 41; and *ibid.*, *Sixth Committee, Sessional Fascicle*, corrigendum.

<sup>100</sup> *Ibid.*, 44th meeting, para. 42; and *ibid.*, *Sixth Committee, Sessional Fascicle*, corrigendum.

<sup>101</sup> *Ibid.*, para. 47; and *ibid.*, *Sixth Committee, Sessional Fascicle*, corrigendum.

<sup>102</sup> *Ibid.*, 45th meeting, para. 22; and *ibid.*, *Sixth Committee, Sessional Fascicle*, corrigendum.

zations were indispensable to carry out the tasks entrusted to them. So far such privileges and immunities had been established in a piecemeal fashion, and the Commission's task was to formulate general rules susceptible of being embodied in an instrument which, although it might be residual in character, could help in unifying present practices and be applied by international organizations in cases of lacunae in the existing special conventions.

198. On the other hand, some representatives doubted the desirability of giving a high degree of priority to work on the matter. Further still, some representatives questioned the usefulness of the work the Commission intended to do in the sphere of relations

between States and international organizations. The view was expressed that that work would not prove useful so long as the 1975 Vienna Convention had not been generally accepted. It was also said that those relations were already adequately regulated by special conventions, practice and Article 105 of the United Nations Charter, and that the Sixth Committee should avoid encouraging another codification effort which might well prove abortive.<sup>103</sup>

<sup>103</sup> *Ibid.*, Annexes, agenda item 112, document A/32/433, paras. 197-198.

## CHAPTER IV

### Examination of general questions in the light of the discussions of the Commission and the Sixth Committee

98. As mentioned earlier in this report,<sup>104</sup> section IV of the preliminary report submitted by the Special Rapporteur in 1977<sup>105</sup> dealt with a number of general questions of a preliminary character. They included: the place of custom in the law of international immunities; differences between inter-State diplomatic relations and relations between States and international organizations; legal capacity of international organizations; and scope of privileges and immunities and uniformity or adaptation of international immunities. As appears from the summary of the discussion of the preliminary report in the Commission at its twenty-ninth session in 1977,<sup>106</sup> a number of general questions were raised by the members of the Commission. Among these questions were: the need for an analysis of the practice of States and international organizations in the fields of international immunities and its impact on the United Nations system; the need to study the internal law of States regulating international immunities; the possibility of extending the scope of the study to all international organizations, whether universal or regional; the need to take account of the particularities of diplomatic law in its application to relations between States and international organizations; and the need to reconcile the functional requirements of international organizations and the security interests of host States. As regards the discussion in the Sixth Committee<sup>107</sup> some representatives raised the following general questions: the relation between the second part of the topic and the general acceptance of the 1975 Vienna Convention; the adequate regulation of the subject matter by existing special conventions and practice; and the advisability of undertaking another codification in

the field of the diplomatic law of relations between States and international organizations.

99. In examining the general questions raised in the discussions in the Commission and the Sixth Committee, the Special Rapporteur has deemed it appropriate to group them into the following basic categories: the impact of institutional evolution and functional expansion in the field of international organizations; the contribution of national law to the legislative sources of international immunities; the case for codification of the law of international immunities and the place of regional organizations in the regime of international immunities.

#### A. The impact of institutional evolution and functional expansion in the field of international organizations

100. Since the adoption by the United Nations General Assembly of the 1946 and 1947 General Conventions, a number of developments have taken place which have had their impact on the United Nations system. Two dominant themes among those developments, which are of particular relevance to the legal status of international organizations, are institutional evolution and functional expansion. These two distinct phenomena of contemporary international legal order have, however, an organic relationship and operational interaction, which have resulted in both a quantitative and qualitative renovation of institutionalized inter-State co-operation. An illustration of the mutual impact between institutional evolution and functional expansion is to be found in the emergence of the institutions of permanent missions and permanent observer missions to international organizations, following the creation of the United Nations in 1945. On the one hand, the practice of establishing permanent representation at the headquarters of international organizations served as a means of following more closely the activities of the organization in periods between sessions of different organs of the organization. This

<sup>104</sup> See para. 3 above.

<sup>105</sup> *Yearbook ... 1977*, vol. II (Part One), p. 151, document A/CN.4/304.

<sup>106</sup> See Chapter II above.

<sup>107</sup> See Chapter III above.

resulted in the addition of the liaison element to the functions of the representatives of States to international organizations. On the other hand, the increase in the functions of the international organization and its assumption of a universal character led States which are not members of the United Nations to send permanent observer missions to enable them to follow the work of the universal organization more closely.

101. It is not possible within the confines of the present report, or for its purposes, to give an account of the different aspects of the institutional evolution or the functional expansion which has taken place in the United Nations, the specialized agencies and other international organizations of universal or regional character during the last 30 years. It suffices, therefore, to refer to some of these aspects as illustrative examples of their impact on the law of immunities of international organizations. These examples are drawn from the practice of the United Nations. At the next stage of work on this topic, it would be necessary, of course, to study the practice of the specialized agencies as well as regional organizations in the light of the replies by the former to the questionnaire addressed to them by the Legal Counsel of the United Nations<sup>108</sup> and the information supplied by the latter to the Special Rapporteur as a result of his personal contacts which he has already initiated with a number of regional organizations.

102. In the course of his work on the first part of the topic of relations between States and international organizations, the Special Rapporteur outlined the development of the institutions of "permanent missions" and "permanent observer missions" to international organizations,<sup>109</sup> which constitutes one of the salient features of the institutional evolution within the framework of the international order established by the Charter of the United Nations in the aftermath of the Second World War. It may be briefly recalled that, while some members of the League of Nations had permanent delegates in Geneva, who were usually members of the diplomatic missions accredited to Switzerland, the practice had not been generally accepted of accrediting permanent delegations to the League of Nations.<sup>110</sup> An early commentary on the Charter of the United Nations noted that, since the new organization had come into being, it had become common practice among its members to maintain permanent delegations at the interim headquarters, and that in April 1948, 45 members had permanent delegations<sup>111</sup> (the total membership was then 57). The General Assem-

bly took note of this practice, recognized its useful contribution to the realization of the purposes of the United Nations and established by resolution 257 A (III) of 3 December 1948 the regulations governing the appointment of permanent representatives, their accreditation and their powers. Permanent observers have been sent by non-member States to the Headquarters of the United Nations at New York and to its European Office at Geneva. Since 1946, a permanent observer has been maintained by the Swiss Government at New York, and later at Geneva. Observers have also been appointed by a number of States before they became members of the United Nations. Besides Switzerland, as noted above, the Democratic People's Republic of Korea, the Holy See, Monaco, San Marino and the Republic of Korea, which are not, at the present time, members of the Organization, maintain permanent observer missions.

103. The practice of sending permanent representatives was not confined to the area of representation of States to international organizations. It also grew in the opposite direction, namely, representation of international organizations to States. There are at present resident representatives of the United Nations at its offices of public information and of UNDP in a number of countries. Observers are also exchanged between the United Nations and the specialized agencies on a reciprocal basis. A number of regional organizations have also established permanent observers at the Headquarters of the United Nations at New York and its European Office at Geneva.

104. Of equally substantial bearing on the refining of the modalities of the immunities of international organizations and the widening of their scope and field of application is the increasing expansion of the activities of the United Nations and other related organizations as a consequence of the theory of functionalism. According to an authority on the theory and functioning of international organizations:

The theory of functionalism is essentially an assertion and defense of the proposition that the development of international economic and social co-operation is a major prerequisite for the ultimate solution of political conflicts and elimination of war ...

The 'functional' sector of international organization is that part of the mass of organized international activities which relates directly to economic, social, technical, and humanitarian matters—that is, to problems which may be tentatively described as non-political. Functional activities are immediately and explicitly concerned with such values as prosperity, welfare, social justice and the 'good life', rather than the prevention of war and elimination of national insecurity.<sup>112</sup>

The development of this type of activity, which had its beginning in the public international unions of the nineteenth century and is now assuming wide-ranging dimensions under the auspices of the United Nations and the specialized agencies, represents a far-reaching orientation in the centre of gravity of

<sup>108</sup> See paras. 9 and 10 above.

<sup>109</sup> See *Yearbook ... 1967*, vol. II, pp. 143 *et seq.*, document A/CN.4/195 and Add.1, paras. 61–79; and *Yearbook ... 1970*, vol. II, p. 6, document A/CN.4/227 and Add.1 and 2, part II.

<sup>110</sup> See P. B. Potter, "Permanent delegations to the League of Nations", *Geneva Special Studies* (Geneva, League of Nations Association of the United States, 1930), vol. I, No. 8.

<sup>111</sup> L. M. Goodrich and E. Hambro, *Charter of the United Nations—Commentary and Documents*, 2nd edition, revised (Boston, World Peace Foundation, 1949) pp. 228–229.

<sup>112</sup> I. L. Claude, Jr., *Swords into Plowshares—The Problems and Progress of International Organizations*, 3rd edition, revised (New York, Random House, 1964), pp. 345, 344.

international organization. It translates into action one of the basic underlying philosophies of the Charter, namely, the creation of conditions of economic development and social progress and stability conducive to the attainment of international peace and security. As such, it seeks to fulfil the objective embodied in Article 55 of the Charter, which reads:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

105. The steady enlargement and diversification of the functional programmes of the United Nations and its related agencies and subsidiary organs has come to be considered a major feature of the United Nations system in operation. Particular attention has been devoted to the promotion of economic and social progress in the developing countries. The leading components of the organizational system have combined their efforts most notably in the expanded Technical Assistance Programme and the collateral operations of the Special Fund, which were later combined as a new United Nations Development Programme. The Secretary-General of the United Nations was authorized by the General Assembly to supplement these programmes by assisting Governments to secure the temporary services of qualified personnel to perform administrative and executive functions (the OPEX Programme). The bearing of all these developments on the scope of international immunities has been multifold. The establishment of permanent offices for UNDP in a great number of countries resulted in the institution of "resident representatives" of international organizations. The sending of *ad hoc* missions and panels and the assignment of experts to assist Governments in the planning and implementation of development projects extended the work and category of experts and persons engaged in the services of the United Nations far beyond those envisaged in the 1946 Convention.

## B. The contribution of national law to the legislative sources of international immunities

106. The basic provisions which regulate the privileges and immunities of international organizations are embodied in their constituent instruments, headquarters agreements and general conventions on privileges and immunities. Legislation governing international immunities designed primarily to give effect to these varied international instruments has now been enacted in a large number of countries. United Kingdom and United States legislation anticipated all but the earliest of the current

international instruments.<sup>113</sup> At the end of 1944, the United Kingdom enacted the British Diplomatic Privileges (Extension) Act, which provided for immunities, privileges and capacities of international organizations, their staff, and the representatives of member Governments. This legislation has been amended in the light of the provisions of the above-mentioned international instruments to conform thereto, particularly in regard to the extent to which immunities are applicable to nationals. The Congress of the United States enacted in 1945 the International Organizations Immunities Act.<sup>114</sup> On 4 August 1947, a joint resolution of the United States Congress was approved by the President, authorizing him to bring into effect an agreement between the United States and the United Nations for the purpose of establishing the permanent headquarters of the United Nations in the United States and authorizing the taking of measures necessary to facilitate compliance with the provisions of such agreement and for other purposes. A number of United States executive orders and administrative regulations were also promulgated to supplement the above-mentioned legislation.<sup>115</sup> Given the federal character of the United States, it was also necessary for the State of New York, where the Headquarters of the United Nations exists, to enact a number of laws to enable it to grant the necessary privileges, immunities and facilities to the United Nations.<sup>116</sup> Other countries in which legislation now exists include Australia, Austria, Canada, Colombia, Cuba, Denmark, Ecuador, Finland, Federal Republic of Germany, Ghana, Greece, Guatemala, Hungary, Israel, Italy, Japan, Netherlands, New Zealand, Norway, Pakistan, Peru, Poland, Republic of Korea, Switzerland, Sweden, Thailand, South Africa, Venezuela and Yugoslavia.<sup>117</sup>

107. Special mention should be made of Switzerland, which is not a member of the United Nations and not a party to the 1946 Convention, but which was one of the first countries to enact legislation in this field. The following is the text of one of the Swiss basic legislative acts:

Le Conseil fédéral suisse décide qu'à partir du 1<sup>er</sup> janvier 1948 les privilèges et immunités accordés aux collaborateurs diplomatiques des chefs de mission accrédités auprès de la Confédération suisse seront également accordés à certains fonctionnaires de rang élevé de l'Office européen des Nations Unies.

...

Le Directeur de l'Office européen des Nations Unies établira une liste des fonctionnaires de rang élevé entrant en ligne de compte et la soumettra au Département politique. La même procédure vaudra pour les désignations ultérieures.

Les hauts fonctionnaires mis au bénéfice de la section 16 de l'arrangement provisoire du 19 avril 1946 ne seront pas compris dans cette liste, étant donné qu'ils jouissent déjà des mêmes

<sup>113</sup> See C. W. Jenks, *International Immunities* (London, Stevens, 1961), pp. 11–12.

<sup>114</sup> See *Legislative texts and treaty provisions ... (op. cit.)*, vol. I, p. 128.

<sup>115</sup> *Ibid.*, pp. 134–144.

<sup>116</sup> *Ibid.*, pp. 152–158.

<sup>117</sup> For a list of countries where legislation exists, see: *ibid.*, vol. I and II, and *United Nations Juridical Yearbook*, 1963 to 1975.

privileges et immunités que les chefs de mission diplomatique accédés auprès de la Confédération suisse.<sup>118</sup>

108. A comparative analysis of the national legislation now existing will be necessary at the subsequent stage of work on this topic. A passing glance at national legislation is presented in this exploratory report only as an indication of the extent to which provision for appropriate immunities has now been made in detail in the national law of States as well as in international agreements.

109. One of the legal issues on which a comparative analysis of national legislation could provide guidance is the *municipal* legal status of international organizations. It is to be noted that some of the municipal legislation which effectuates the prerogatives of international organizations have likened the organizations to bodies corporate. The United Kingdom International Organizations (Immunities and Privileges) Act of 1950, the Canadian Privileges and Immunities (United Nations) Act of 1952 and the Canadian Order in Council of 1947, as well as the New Zealand Diplomatic Immunities and Privileges Act of 1957 and the Diplomatic Privileges (United Nations) Order of 1959, contain just such provisions. Each of them declares that the organization in question shall have "the legal capacities of a body corporate".<sup>119</sup>

110. The tendency to consider international organizations as bodies corporate under municipal law has given rise to a great deal of controversy in doctrine. Some writers maintain that there are two significant differences between a national corporation and an international organization endowed with corporate personality. In the first place, as Weissberg points out,<sup>120</sup> the municipal capacity of an international organization, which is a privilege, is customarily coupled with jurisdictional immunity. Crosswell observes that:

Although the legal status of the organizations, akin to corporate personality, carries with it the usual power to acquire the benefits and burdens of legal obligations, the duties to which an international organization becomes subject in a legal transaction are duties of implicit obligation rather than absolute obligation. They exist fully in the legal sense, but cannot be enforced against the organization unless consent has been given in the form of waiver, express or implied.<sup>121</sup>

In the second place, the legal capacity of an international organization does not rest, as in the case of national corporations, on municipal law, but is instead grounded in international law. This notion has been expressed by Jenks as follows:

The legal capacity of public international organizations, like that of individual foreign States, derives from public international law; municipal legislation may be necessary to secure effective recognition of this capacity for municipal purposes, but the function

of such legislation is declaratory and not constitutive ... [I]t is as inherently fantastic as it is destructive of any international legal order to regard the existence and extent of legal personality provided for in the constituent instrument of an international organization as being derived from, dependent upon, and limited by the constitution and laws of its individual member States.<sup>122</sup>

### C. The case for codification of the law of international immunities

111. In the debates in the Commission and the Sixth Committee, as reviewed in chapters II and III of this project, certain reservations and qualifications were expressed regarding the advisability of undertaking at the present time the task of codifying the second part of the topic of relations between States and international organizations, namely, the legal status, privileges and immunities of international organizations. Concern was manifested in particular as to the implications of such a codification on the headquarters agreements and the 1946 and 1947 Conventions. It was also contended that, in the sphere of privileges and immunities of international organizations, the rules were evolving so much that codification work may check the evolution of this branch of international law. This difficulty is not new and the Commission encountered it in the first part of the topic, namely, the status of representatives of States to international organizations. Both the Commission and the United Nations Conference on the Representation of States in Their Relations with International Organizations took great care to safeguard the position of the conventions on the privileges and immunities of the United Nations and the specialized agencies and the headquarters of those organizations. Thus paragraph 7 of the preamble of the 1975 Vienna Convention<sup>123</sup> reads:

*Taking account of the Convention on the Privileges and Immunities of the United Nations of 1946, the Convention on the Privileges and Immunities of the Specialized Agencies of 1947 and other agreements in force between States and between States and international organizations;*

The implications of this statement in the statement in the preamble of the Convention are explicitly and elaborately laid down and defined in article 4:

#### *Article 4. Relationship between the present Convention and other international agreements*

The provisions of the present Convention

(a) are without prejudice to other international agreements in force between States or between States and international organizations of a universal character, and

(b) shall not preclude the conclusion of other international agreements regarding the representation of States in their relations with international organizations of a universal character or their representation at conferences convened by or under the auspices of such organizations.

<sup>118</sup> *Legislative texts and treaty provisions ... (op. cit.)*, vol. I, p. 92.

<sup>119</sup> *Ibid.*, pp. 11, 12, 59, 65 and 119.

<sup>120</sup> G. Weissberg, *The International Status of the United Nations* (New York, Oceana, 1961), p. 147.

<sup>121</sup> C. M. Crosswell, *Protection of International Personnel* (New York, Oceana, 1952), p. 19.

<sup>122</sup> C. W. Jenks, "The legal personality of international organizations", *British Year Book of International Law*, 1945 (London), vol. 22, pp. 270-271.

<sup>123</sup> For reference, see foot-note 1 above.

112. Article 4 is particularly significant. Its purpose is twofold. First, it is intended to reserve the position of existing international agreements regulating the subject matter. Thus, while intended to provide a uniform regime, the rules of the Convention are without prejudice to different rules which may be laid down in such agreements. Secondly, it is recognized that situations may arise in the future in which States establishing a new international organization may find it necessary to adopt different rules more appropriate to that organization. The rules of the Convention are not intended in any way to preclude any further development of the law in this area.<sup>124</sup>

113. In the discussion of the Sixth Committee, some representatives questioned the usefulness of the work the Commission intended to do in relation to the second part of the topic of relations between States and international organizations (legal status, privileges and immunities of international organizations). The view was expressed that that work would not prove useful so long as the 1975 Vienna Convention had not been generally accepted. The Special Rapporteur wishes to make two observations in this respect. First, the Commission has on a number of occasions in the past deemed it possible to start the consideration of a topic which constituted a subject closely related to, or even an offspring of, a convention before the entry of the latter into force and its general acceptance. Such was the course of action taken by the Commission in relation to the topics of "special missions", "succession of States in respect of treaties", and "question of treaties concluded between States and international organizations or between two or more international organizations". Second, while the two parts of the topic of relations between States and international organizations have admittedly an organic relationship, each one of them constitutes a self-contained unit capable of being the subject of separate codification. This concept was accepted by the Commission when it recommended in 1971 "that the General Assembly should convene an international conference of plenipotentiaries to study the Commission's draft articles on the representation of States in their relations with international organizations and to conclude a convention on the subject"<sup>125</sup> This recommendation was accepted by the General Assembly. It is worth recalling that, when the General Assembly considered in 1971 the recommendation of the Commission, some representatives suggested that action on the first part of the topic should be deferred pending the completion of its second part. The following is a summary of the discussion which took place in this respect in the Sixth Committee, as recorded in its report to the General Assembly:

<sup>124</sup> For a fuller account of the purposes of this article, see *Yearbook ...*, 1971, vol. II (Part One), pp. 287-288, document A/8410/Rev.1, chapter II, section D, draft articles on the representation of States in their relations with international organizations, commentaries to articles 3 and 4.

<sup>125</sup> *Ibid.*, p. 284, para. 57.

(e) *Timing for the elaboration of a convention on the topic*

119. Some representatives considered that it would be preferable to take up the question of the representation of States in their relations with international organizations only after the Commission had completed its study of the topic of relations between States and international organizations by considering the representation of organizations to States and in particular the question of the privileges and immunities of the organizations themselves and of their officials. The question of granting privileges and immunities to permanent missions and permanent observer missions within the meaning of article I, as well as to delegations to organs and conferences, was intimately linked to the legal status of those organizations. The work of the Commission would thus form a whole and States would be able to state their views in full knowledge of all the facts; the two complementary questions could be dealt with in a single instrument.

120. On the other hand, it was considered that any such arguments could only be a pretext for perpetuating situations which were jeopardizing the independence of international organizations. The Commission currently had five topics under discussion, as set forth in chapters III and IV of its report. That would keep it occupied for several years, bearing in mind that the Commission met once a year for a short period of 10 weeks. The draft articles should therefore not be set aside until all the other aspects of the question of relations between States and international organizations had been studied.<sup>126</sup>

#### D. The place of regional organizations in the regime of international immunities

114. When the Commission discussed the preliminary report of the Special Rapporteur at its last session, there was general agreement that the work of the Commission on the second part of the topic of relations between States and international organizations should cover all international organizations, and not exclusively those of a universal character. This position is different from the one it took in relation to the first part of the topic.

115. In the course of the discussion of the work to be undertaken by the Commission on the representation of States to international organizations, the place of regional organizations in that work was the subject of divergencies of opinion among its members. In his first report on the first part of the topic submitted to the Commission in 1963,<sup>127</sup> the Special Rapporteur suggested that the Commission should concentrate its work on this subject first on international organizations of a universal character (the United Nations system) and prepare its draft articles with reference to these organizations only, and should examine later whether they could be applied to regional organizations as they stood, or whether they required modification. In explaining his suggestion, he stated that:

The study of regional organizations raised a number of problems, such as recognition by, and relationship with, non-member

<sup>126</sup> *Official Records of the General Assembly, Twenty-sixth Session, Annexes*, agenda item 88, document A/8537, paras. 119-120.

<sup>127</sup> *Yearbook ... 1963*, vol. II, document A/CN.4/161 and Add.1, p. 159.



States, which would call for the formulation of special rules for those organizations.<sup>128</sup>

Some members of the Commission took issue with this suggestion. They thought that regional organizations should be included in the study, pointing out that relations between States and organizations of a universal character might not differ appreciably from relations between States and smaller regional organizations. They further pointed out that, if the Commission were to confine itself to the topic of the relations of organizations of a universal character with States, it would be leaving a serious gap, and that relations with States were apt to follow a very similar pattern, whether the organization in question was of a universal or a regional character. Several members of the Commission, however, expressed themselves in favour of the suggestion by the Special Rapporteur to exclude regional organizations at least from the initial stage of the study. They stated that any draft convention to be prepared concerning the relations between States and intergovernmental organizations should be concerned with those of a universal character and not with regional organizations, though the experience of the latter could be taken into account in the study. They argued that regional organizations were so diverse that uniform rules applicable to all of them could hardly be formulated. They therefore thought that it would probably be better to leave those regional organizations great latitude to settle their own relations with Governments. An interesting point of a constitutional character was raised by one member, who stated that some regional organizations had their own codification organs and it was undesirable that the Commission should invade the field assigned to them.

<sup>128</sup> *Ibid.*, vol. I, p. 298, 717th meeting, para. 109.

116. The Commission adopted an intermediary solution, which was embodied in paragraphs 2 and 4 of article 2 of its draft articles on the representation of States in their relations with international organizations:

*Article 2. Scope of the present articles*

1. The present articles apply to the representation of States in their relations with international organizations of universal character and to their representation at conferences convened by or under the auspices of such organizations.

2. The fact that the present articles do not relate to other international organizations is without prejudice to the application to the representation of States in their relations with such other organizations of any of the rules set forth in the present articles which would be applicable under international law independently of these articles.

3. The fact that the present articles do not relate to other conferences is without prejudice to the application to the representation of States at such other conferences of any of the rules set forth in the present articles which would be applicable under international law independently of these articles.

4. Nothing in the present articles shall preclude States from agreeing that the present articles apply in respect of:

(a) international organizations other than those of universal character, or

(b) conferences other than those convened by or under the auspices of such organizations.<sup>129</sup>

The position taken by the Commission was approved by the United Nations Conference on the Representation of States in Their Relations with International Organizations in 1975.

<sup>129</sup> *Yearbook ... 1971*, vol. II (Part One), pp. 286-287, document A/8410/Rev.1, chap. II, sect. D.

## CHAPTER V

### Conclusions

117. It is a matter of gratification that the discussions both in the International Law Commission and the Sixth Committee of the General Assembly have revealed general agreement on the desirability of the Commission's taking up the study of the second part of the topic "Relations between States and international organizations". Subject to a few reservations which concerned matters of approach and methodology rather than principle, members of the Commission and delegations to the Sixth Committee were in favour of a study of the immunities of international organizations with a view to completing the work of the Commission in the field of diplomatic law, which culminated in the adoption of the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention.<sup>130</sup>

118. The second conclusion to be drawn from these discussions is that the work of the Commission on the second part of the topic should proceed with great prudence. For the determination of the form which the outcome of such work should take, it would be necessary to examine thoroughly existing international instruments as supplemented by national legislation and developed in practice. It is only following such an investigation that it would be possible to decide in favour of a comprehensive convention or a supplementary protocol whose objective would be the filling of gaps and the formulation of

<sup>130</sup> For references to texts of these instruments, see foot-notes 11, 12, 13 and 1 above, respectively.

rules to cover the new situations and recent developments which have taken place since the adoption of the 1946 and 1947 Conventions.

119. Several members of the Commission expressed themselves in favour of extending the scope of the envisaged study to include all international organizations, whether of a universal or regional character. Some members thought that the intermediary solution adopted by the Commission in connexion with the first part of the topic should be opted for in its work on the second part as well. Others sought the advice of the Special Rapporteur on the question of the place of regional organizations in the regime of international immunities.

120. The Special Rapporteur wishes to point out that his thinking on this issue has undergone significant change since 1963 when, in submitting his first report, he recommended to the Commission that its work on the topic should concentrate on international organizations of universal character (the United Nations system) and that it prepare its draft articles with reference to these organizations only.<sup>131</sup> A number of factors influenced that position taken by the Special Rapporteur. First, it is to be recalled that the Special Rapporteur presented a broad outline of the questions to be considered in connexion with the external relations of international organizations and the legal problems to which they give rise. The outline comprised, as a first group of such problems, the general principles of the international personality of international organizations. He thought that the study of such theoretical questions would present difficulties of a basically different character if the study were to apply to regional organizations. An illustration of the relevance of the universal character of an international organization to the general recognition of its possession of international personality is the finding of the International Court of Justice, in its advisory opinion of 11 April 1949 on "Reparation for injuries suffered in the service of the United Nations", that:

... fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone ...<sup>132</sup>

Second, the Special Rapporteur was conscious of the fact that, while within the framework of international organizations of a universal character the institution of permanent observer missions was becoming an established practice and the institution of permanent observer missions was developing steadily, the same could not be noted with regard to international organizations of a regional character. Third, unlike the situation in relation to international organizations of a universal character, the rather limited volume of legislative sources of the law of immunities and the evolving character of practice in relation to international organizations of a regional character at the time

when the Commission initiated its work on the topic of relations between States and international organizations in 1963, caused the Special Rapporteur to believe that he would not be in a position to make the investigation necessary for the inclusion of regional organizations.

121. The above-mentioned factors which influenced the thinking of the Special Rapporteur during the initial years of his study of the first part of the topic of relations between States and international organizations, on the issue of the inclusion of regional organizations within the scope of the envisaged codification, at present appear in an entirely different perspective when viewed in the light of recent developments and in relation to the second part of the topic. First, the Commission has consistently adopted an approach in dealing with topics relating to international organizations of not favouring the course of engaging itself in such theoretical notions as the concept of an international organization, its international personality, or its treaty-making capacity. The Commission has preferred instead to deal with the practical aspects and concrete issues of the rules which govern the relations between States, and international organizations. Second, whether the questions which may constitute the subject-matter of the eventual codification of the legal status and immunities of international organizations are taken up within the frame work of international organizations of a universal character or of a regional character, they are by and large analogous. In his preliminary report submitted in 1977,<sup>133</sup> the Special Rapporteur included the following categories as beneficiaries of privileges and immunities: the organization; officials of the organization; experts on missions for, and persons having official business with, the organization; and resident representatives and observers sent by international organizations to States or by one international organization to another international organization. All these institutions exist at present within the framework of international organizations of a regional character. Third, the legislative sources, whether in the form of international instruments or national law, as well as practice in the area of regional organizations have become comparatively rich as a result of the increasing network of regional organizations and their subsidiary organs. The theory of functionalism has had its impact also in the domain of these organizations. The five-volume compilation of the principal legal instruments published by UNCTAD entitled "Economic co-operation and integration among developing countries"<sup>134</sup> contains an impressive list of organs established on the regional level and the text of a number of conventions on their privileges and immunities. The list includes:

*Latin America:* Inter-American Development Bank, Latin American Economic System, Central American Common Market, Central American Bank for

<sup>131</sup> See *Yearbook ... 1963*, vol. II, p. 185, document A/CN.4/161 and Add.1, para. 179.

<sup>132</sup> *I.C.J. Reports 1949*, p. 185.

<sup>133</sup> *Yearbook ... 1977*, vol. II (Part One), p. 139, document A/CN.4/304.

<sup>134</sup> TD/B/609/Add.1, vol. I, II, III and Corr.1, IV and V.

Economic Integration, Caribbean Community, Caribbean Development Bank, Caribbean Investment Corporation, East Caribbean Common Market, Latin American Free Trade Association, Andean Common Market, Andean Development Corporation and the River Plate Basin.

*Africa:* African Development Bank, Common Afro-Mauritian Organization, Lake Chad Basin Commission, River Niger Commission, Economic Community of West African States, West African Clearing House, West African Economic Community, Council of the Entente, Mutual Aid and Loan Guaranty Fund, Mano River Union, Organization for the Development of the Senegal River, West African Monetary Union, Central Bank of West African States, West African Development Bank, Central African Customs and Economic Union, Union of Central African States, Bank of the Central African States and East African Community.

*Arab States, Asia and Oceania:* Permanent Consultative Committee of the Maghreb Countries, Arab Economic Unity, Islamic Development Bank, Arab Bank for Economic Development in Africa, Arab Fund for Economic and Social Development, Arab Investment Company, Inter-Arab Investment Guarantee Corporation, Asian Development Bank, Asian Clearing Union, System of economic co-operation established by the Bangkok Agreement, Regional Co-operation for Development, Association of South-East Asian Nations, South Pacific Commission and South Pacific Bureau for Economic Co-operation.

122. It is therefore the considered opinion of the Special Rapporteur, that the Commission should adopt, for the purpose of its initial work on the second part of the topic, a broad outlook approach; the study should include regional organizations. The definitive decision to include such organizations in the eventual codification can only be made when the study is completed.

123. The same broad outlook approach should be adopted in relation to the subject matter of the study. Some members of the Commission suggested that a few problems should be selected for consideration at the first stage, such as those concerning the legal status and immunities of international organizations, and that the much more delicate problems relating to international officials should be left until later. The Special Rapporteur has given serious thought to this matter and submits that the decision on the priority issue should also be deferred pending the completion of the study.

124. The Special Rapporteur wishes to address himself to another point which was raised by some members of the Commission in relation to the subject matter of the study. Reference was made to the parallel to be drawn between jurisdictional immunities of States and those of international organi-

zations. While recognizing the relationship between these two sets of jurisdictional immunities, it is to be noted that the rationale of immunities of States is sovereignty while the rationale of immunities of international organizations is their functional needs. Furthermore, the Commission recommended in 1977 the selection in the near future of the topic of jurisdictional immunities of States and their property for active consideration by the Commission,<sup>135</sup> an approach endorsed by the General Assembly in its resolution 32/151 of 19 December 1977. The Commission established at its present session a Working Group on that topic under the chairmanship of Mr. Sucharitkul to undertake the necessary exploratory work. That Working Group has recommended the appointment of a Special Rapporteur for the topic and the inclusion of the topic in the Commission's current programme of work. The Commission will therefore be aware of the orientation of its work on jurisdictional immunities of States when it examines immunities of international organizations.

125. The Special Rapporteur wishes to express his deep appreciation to the Legal Counsel of the United Nations for the comprehensive questionnaire which he addressed to the specialized agencies and IAEA with a view to eliciting information concerning the practice of the specialized agencies and IAEA, relating to their privileges and immunities, their officials and other persons engaged in their activities not being representatives of States.<sup>136</sup> He is confident that the materials which will be furnished by the United Nations and the specialized agencies and IAEA on the basis of the examination of their files during the period from 1 January 1966 to the present will be of great help to the Special Rapporteur and the Commission. He wishes also to express the hope that these materials will be later published in the *Yearbook of the International Law Commission* to secure their wider dissemination and practical accessibility. The study, which was prepared by the Codification Division of the Office of Legal Affairs and published in the Commission's *Yearbook* in 1967,<sup>137</sup> has proved to be an extremely rich and valuable source of information and research for both scholars and practitioners in the field of international law and international organization.

126. In concluding this report, the Special Rapporteur wishes also to express the hope that arrangements will be made to ensure the association of the specialized agencies and IAEA, as well as Switzerland, with the preparation of any draft articles to be proposed by the Commission on the second part of the topic similar to those made in connexion with the first part of the topic. When the Commission prepared its provisional draft articles on representation of States in their relations with international organizations, it decided to submit them not only to

<sup>135</sup> See *Yearbook ... 1977*, vol. II (Part Two), p. 130, document A/32/10, para. 110.

<sup>136</sup> See paras. 9 and 10 above.

<sup>137</sup> See para. 7 above.

Governments of Member States for their observations but also to the secretariats of the United Nations, the specialized agencies and IAEA for their observations. Again bearing in mind the position of Switzerland as the host State in relation to the United Nations Office at Geneva and to a number of specialized agencies, as well as the wish expressed by

the Government of that country, the Commission deemed it useful to transmit the draft articles also to that Government for its observations.<sup>138</sup>

<sup>138</sup> See *Yearbook ... 1970*, vol. II, p. 276, document A/8010/Rev.1, para. 24.



## REVIEW OF THE MULTILATERAL TREATY-MAKING PROCESS (PARA. 2 OF GENERAL ASSEMBLY RESOLUTION 32/48)

[Agenda item 8]

DOCUMENT A/CN.4/310

Note by the Secretariat

[Original: English]  
[3 April 1978]

1. The General Assembly, at its thirty-second session, included in the agenda of that session an item entitled "Review of the multilateral treaty-making process" (item 124) and allocated it to the Sixth Committee. The inclusion of the item in the provisional agenda of the Assembly's thirty-second session had been requested by the representatives of Australia, Egypt, Indonesia, Kenya, Mexico, the Netherlands and Sri Lanka in a letter dated 19 July 1977 accompanied by an explanatory memorandum.<sup>1</sup>

2. The Sixth Committee considered the item at its 46th to 50th meetings, between 15 and 18 November 1977. Summaries of the views expressed by representatives in the Committee during the debate on the item appear in the records of those meetings.<sup>2</sup> The Sixth Committee recommended to the General Assembly a draft resolution on the item<sup>3</sup> which was

subsequently adopted by the Assembly at its 97th plenary meeting on 8 December 1977 as resolution 32/48.

3. In paragraphs 1 and 2 of that resolution, the General Assembly:

1. *Requests* the Secretary-General to prepare a report on the techniques and procedures used in the elaboration of multilateral treaties, taking also into consideration the debates in the General Assembly at the current session and the observations referred to in paragraph 2 below, with a view to its submission to the Assembly at its thirty-fourth session;

2. *Invites* Governments and the International Law Commission to submit by 31 July 1979, for inclusion in the report referred to above, their observations on this subject.

4. In pursuance of the invitation made to the Commission by the General Assembly in paragraph 2 of the above quoted resolution, the Secretariat included in the provisional agenda of the Commission's thirtieth session (A/CN.4/306) an item (8) entitled: "Review of the multilateral treaty-making process (para. 2 of General Assembly resolution 32/48)". The General Assembly documents relevant to this item have been transmitted to the members of the Commission.

<sup>1</sup> See *Official Records of the General Assembly, Thirty-second Session, Annexes*, agenda item 124, document A/32/143.

<sup>2</sup> *Ibid.*, *Thirty-second Session*, 46th–50th meetings; and *ibid.*, *Sessional Fascicle*, corrigendum.

<sup>3</sup> *Ibid.*, *Thirty-second Session, Annexes*, agenda item 124, document A/32/363, para. 6.

## CHECK LIST OF DOCUMENTS OF THE THIRTIETH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/306	Provisional agenda	Mimeographed. For the agenda as adopted, see A/33/10, para. 12 (vol. II (Part Two)), p. 6.
A/CN.4/307 and Add.1-2 and Add.2/Corr.1	Seventh report on State responsibility, by Mr. Roberto Ago, Special Rapporteur: the internationally wrongful act of the State, source of international responsibility ( <i>continued</i> )	Reproduced in the present volume (p. 31).
A/CN.4/308 and Add.1, Add.1/Corr.1 and Add.2	Comments of Member States, organs of the United Nations, specialized agencies and other intergovernmental organizations on the draft articles on the most-favoured-nation clause adopted by the International Law Commission at its twenty-eighth session	Reproduced as an annex to A/33/10 (vol. II (Part Two)), p. 161.
A/CN.4/309 and Add.1-2	Report on the most-favoured-nation clause, by Mr. Nicolai Ushakov, Special Rapporteur	Reproduced in the present volume (p. 1).
A/CN.4/310	Review of the multilateral treaty-making process (para. 2 of General Assembly resolution 32/48): note by the Secretariat	<i>Idem</i> (p. 287).
A/CN.4/311 and Add.1	Second report on the second part of the topic of relations between States and international organizations, by Mr. Abdullah El-Erian, Special Rapporteur	<i>Idem</i> (p. 263).
A/CN.4/312	Seventh report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur: draft articles and commentary ( <i>continued</i> )	<i>Idem</i> (p. 247).
A/CN.4/313	Tenth report on succession of States in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur: draft articles, with commentaries, on succession to State debts ( <i>continued</i> )	<i>Idem</i> (p. 229).
A/CN.4/314	The law of the non-navigational uses of international watercourses: replies of Governments to the Commission's questionnaire	<i>Idem</i> (p. 253).
A/CN.4/315	State responsibility—"force majeure" and "fortuitous event" as circumstances precluding wrongfulness: State practice, international judicial decisions and doctrine. Survey prepared by the Secretariat	<i>Idem</i> (p. 61)
A/CN.4/L.264	Draft articles on the most-favoured-nation clause: article A proposed by Mr. Reuter	Text reproduced in A/33/10, para. 55 (vol. II (Part Two)), p. 13.
A/CN.4/L.265	<i>Idem</i> : article 21 <i>ter</i> proposed by Mr. Reuter	<i>Idem</i>
A/CN.4/L.266	<i>Idem</i> : article 21 <i>bis</i> proposed by Mr. Njenga	Text reproduced in the summary record of the 1494th meeting (vol. I), para. 25.
A/CN.4/L.267	<i>Idem</i> : article 23 <i>bis</i> proposed by Sir Francis Vallat	Text reproduced in A/33/10, para. 57 (vol. II (Part Two)), p. 13.
A/CN.4/L.268	Most-favoured-nation clause: statement made by the representative of the UNCTAD secretariat at the 1497th meeting, at the request of the Commission	<i>Idem</i> , annex, sect. B (vol. II (Part Two)), pp. 176-177.
A/CN.4/L.269	Draft articles on treaties concluded between States and international organizations or between international organizations. Texts adopted by the Drafting Committee: paragraph 1 ( <i>h</i> ) of article 2, and articles 35, 36, 36 <i>bis</i> , 37 and 38	Texts reproduced in the summary records of the 1509th, 1510th and 1512th meetings (vol. I).



<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.270	Draft articles on the most-favoured-nation clause: article 28 proposed by Mr. Tsuruoka	Text reproduced in A/33/10, para. 68 (vol. II (Part Two)), p. 15.
A/CN.4/L.271 and Add.1	Draft articles on State responsibility. Texts adopted by the Drafting Committee: articles 23-27 and title of chapter IV of the draft	Texts reproduced in the summary records of the 1513th and 1524th meetings (vol. I).
A/CN.4/L.272	Draft articles on succession of States in respect of matters other than treaties. Texts adopted by the Drafting Committee: articles 23-25	<i>Idem</i> , 1514th and 1515th meetings (vol. I).
A/CN.4/L.273	Draft report of the Commission on the work of its thirtieth session: chapter I	Mimeographed. For the final text, see A/33/10 (vol. II (Part Two)).
A/CN.4/L.274 and Add.1-6	<i>Idem</i> : chapter II	<i>Idem</i> .
A/CN.4/L.275 and Add.1-5	<i>Idem</i> : chapter III	<i>Idem</i> .
A/CN.4/L.276 and Corr.1	<i>Idem</i> : chapter IV	<i>Idem</i> .
A/CN.4/277	<i>Idem</i> : chapter V	<i>Idem</i> .
A/CN.4/L.278 and Add.1, 3 and 4	<i>Idem</i> : chapter VIII	<i>Idem</i> .
A/CN.4/L.279	Report of the Working Group on jurisdictional immunities of States and their property	Replaced by A/CN.4/L.279 Rev.1.
A/CN.4/L.279/Rev.1	<i>Idem</i>	Section III reproduced in A/33/10, chapter VIII, section D, annex (vol. II (Part Two)), pp. 153-155.
A/CN.4/L.280	Draft articles on most-favoured-nation clauses. Texts adopted by the Drafting Committee: title of the draft and articles 1-29	Texts reproduced in the summary record of the 1521st meeting (vol. I).
A/CN.4/L.281	Draft articles on the most-favoured-nation clause: text of article 23 <i>bis</i> [renumbered article 24] adopted by the Commission at its 1520th meeting	<i>Idem</i> , 1520th meeting, (vol. I), para. 43.
A/CN.4/L.282 and Corr.1	Draft articles on succession of States with respect to matters other than treaties: memorandum submitted by Mr. Tsuruoka regarding article 23, paragraph 2, adopted by the Commission	Reproduced in the present volume (p. 244).
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A/CN.4/L.287	<i>Idem</i> : annex	<i>Idem</i> .
A/CN.4/L.288	<i>Idem</i> : chapter VI	<i>Idem</i> .
A/CN.4/SR.1474-1529	Provisional summary records of the 1474th to 1529th meetings of the Commission	Mimeographed. For the final text, see vol. I.









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